(28,933)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 393.

HARVEY McCONAUGHEY, FOR HIMSELF AND OTHERS, EMPLOYEES OF THE PANAMA CANAL AND OF THE PANAMA RAILROAD COMPANY, APPELLANT,

vs.

J. J. MORROW, GOVERNOR OF THE PANAMA CANAL; H. A. A. SMITH, AUDITOR OF THE PANAMA CANAL, AND R. W. GLAW, PAYMASTER OF THE PANAMA CANAL.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 11, 1922.

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UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Judicial Circuit.

Pleas and proceedings had and done at a regular term of the United States Circuit Court of Appeals for the Fifth Circuit begun on the third Monday in November, A. D. 1921, at New Orleans, Louisiana, before the Honorable Richard W. Walker, the Honorable Nathan P. Bryan, and the Honorable Alex. C. King, circuit judges.

HARVEY MCCONAUGHEY, for Himself and Others, Appellant and Plaintiff in Error,

versus

J. J. MORROW, Governor of the Panama Canal et als., Appellees and Defendants in Error.

Be it remembered, That heretofore, to-wit, on the 21st day of January, A. D. 1922, a transcript of the record in the above styled cause, pursuant to an appeal from and *and* writ of error to the United States District Court for the Canal Zone, was filed in the office of the Clerk of the said United States Circuit Court of Appeals for the Fifth Circuit, which said transcript was filed and docketed in said Circuit Court of Appeals as No. 3826, as follows, to-wit:

UNITED STATES OF AMERICA.

UNITED STATES DISTRICT COURT, IN AND FOR THE CANAL ZONE.

HARVEY McCONAUGHEY, FOR HIMSELF AND IN BEHALF OF ALL OTHER EMPLOYEES OF THE PANAMA CANAL AND THE PANAMA RAILROAD, ON THE ISTHMUS OF PANAMA,
Appellant-Plaintiff in Error,

versus No. 540.

J. J. MORROW, GOVERNOR OF THE PANAMA CANAL; H. A. A. SMITH, AUDITOR OF THE PANAMA CANAL; R. W. GLAW, PAYMASTER OF THE PANAMA CANAL; AND AGAINST THE SUCCESSORS IN OFFICE OF ALL OF THE SAID PARTIES,
Appellees-Defendants in Error.

William C. MacIntyre, Esquire, for Harvey McConaughey, et al.,

A. C. Hindman, U. S. District Attorney, for J. J. Morrow, et al.

Appeal from the United States District Court, District of the Canal Zone, returnable into the United States Circuit Court of Appeals for the Fifth Circuit, within thirty (30) days from the 5th day of January, A. D. One Thousand, Nine Hundred and Twenty-two, at the City of New Orleans, State of Louisiana, U. S. A.

TRANSCRIPT OF RECORD.

1 TRANSCRIPT OF RECORD.

United States of America,

United States District Court, in and for the Canal Zone.

Harvey McConaughey, for himself and in behalf of all other employees of the Panama Canal and the Panama Railroad, on the Isthmus of Panama,
Plaintiffs,

versus No. 540

J. J. Morrow, Governor of the Panama Canal; H. A. A. Smith, Auditor of the Panama Canal; R. W. Glaw, Paymaster of the Panama Canal; and against the successors in office of all of the said Parties.
Defendants.

Attorney for Plaintiffs,—William C. MacIntyre, Esquire.

Attorney for Defendants,—A. C. Hindman, United States District Attorney.

Appeal from and Writ of Error to the United States District Court, Balboa Division, Canal Zone, January 5th, 1922.

United States of America,
Canal Zone. SS.

Pleas before the Honorable Charles Kerr, Judge of the United States District Court of the Canal Zone, at the December term thereof begun and holden at Ancon, in the Balboa Division, in the Court House of said District Court, on the 24th day of December, in the year of our Lord, one thousand, nine hundred and twenty-one.

Present: Hon. Charles Kerr, Judge.
Hon. Horace D. Ridenour, Marshal.
Hon. A. C. Hindman, United States District Attorney.

Attest:

E. M. GOOLSBY, Clerk.

And the following proceedings were had:

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2 COMPLAINT.

United States of America, Canal Zone.

In the United States District Court for the Canal Zone, Balboa Div.

Harvey McConaughey, for himself and in behalf of all other employees of the Panama Canal and the Panama Railroad, on the Isthmus of Panama,
Plaintiff,
vs. No. 540 Civil.

J. J. Morrow, Governor of the Panama Canal; H. A. A. Smith, Auditor of the Panama Canal; R. W. Glaw, Paymaster of the Panama Canal, and against the successors in office of all of the said Parties,
Defendants.

Plaintiff complains of the defendants, and alleges:

1.

The plaintiff is a citizen of the United States of America, and is a tax payer to said Government; and

plaintiff is an employee of the United States upon the Isthmus of Panama, in the service of the Panama Canal, and is domiciled in the town of Balboa, Canal Zone. And plaintiff brings this suit for himself and in behalf of all other citizens of the United States of America who are employees of the United States in the service of the Panama Canal and of the Panama Railroad, within the Canal Zone and upon the Isthmus of Panama. And the rights, interest, claims, grievances and demands of all other employes of the United States in the service of The Panama Canal and of the Panama Railroad, upon the Isthmus of Panama, as against the defendants herein, are identical with those of plaintiff, and the relief herein demanded affects all such parties equally with plaintiff, and all of such persons are interested parties in the final outcome of this suit; but plaintiff says, and shows unto the Court, that all of
3 such persons interested herein, as aforesaid, number about three thouand, (3,000), more or less, and reside at different parts of the Canal Zone, and of the Isthmus of Panama, and that it is impracticable to join all of such parties as parties plaintiff hereto.

And defendants, and all of them are employees of the United States, in the service of The Panama Canal, and all of the defendants occupy positions and are performing the duties of officials of the Panama Canal; the said J. J. Morrow being the present Governor of the Panama Canal; the said H. A. A. Smith being the present Auditor of the Panama Canal, and the said R. W. Glaw being the present Paymaster of the Panama Canal. And the plaintiff, and the defendants, and all of those in whose behalf plaintiff brings this suit, as aforesaid, are at present employed upon the Isthmus of Panama, by appointment of the President, or by his authority, in accordance with the provisions of the Act

of Congress approved August 24, 1912, known as the Panama Canal Act.

II.

That on date of June 28, 1902, an Act of Congress was approved, authorizing the President, through the Isthmian Canal Commission, by said Act created, to construct the Panama Canal and works appurtenant thereto; and by the provisions of the same Act the Secretary of the Treasury of the United States was authorized to borrow on the credit of the United States for the purpose of defraying the expenses of the work authorized by said Act, the sum of $130,000,000.00, and the proceeds of said loan were appropriated exclusively by Congress, in said Act, for the purposes in said Act specified. And by Act of Congress of August 5, 1909, (36 Stat., 117), the Secretary of the Treasury of the United States was authorized to borrow on the credit of the United States a further sum of $290,569,000.00 to be used for the construction of the said Panama Canal. And all of said monies being public monies of the United States, were appropriated by Congress and expended for the construction of the said Canal and all appurtenant works. And as part of said work or works, there were constructed from said money, so authorized and appropriated, as aforesaid, by the
4 President, through the Isthmian Canal Commission, and other persons appointed by him, by authority of law, within the Canal Zone and on other parts of the Isthmus of Panama, various quarters, or dwelling houses, for the housing and quartering of American employees of the United States engaged in the service of the said Isthmian Canal Commission, the Panama Canal and the Panama Railroad. And all of said quarters or dwelling houses builded as aforesaid,

from public monies of the United States, are property of the United States, builded, constructed, designed and dedicated to the purpose of providing free quarters and dwellings for all American citizens, employees of the United States, engaged in the service of the said Panama Canal upon the Isthmus of Panama. And the President under authority of Congress, caused the work of constructing the Panama Canal to begin in the month of of March, 1904; and from that time the President, and those acting under his authority and by his direction, caused regulations to be made, adopted and promulgated, providing that all American citizens employed by the United States upon the Isthmus of Panama in service in connection with the Panama Canal should be furnished by the United States with free quarters during their employment. And at its one hundred and twentieth meeting, held in the City of Washington, D. C., on date of February 13, 1907, the Isthmian Canal Commission, by order and authority of the President, adopted, promulgated and published certain regulations concerning general conditions of employment upon the Isthmus of Panama for employees of the United States, engaged in the construction of the Panama Canal; which said regulations, adopted and promulgated as aforesaid, for the construction of the Panama Canal, provided, among other privileges of such employees, that where practicable and in the best interests of the service, such employees should be provided with such quarters on the Isthmus of Panama as might be available from time to time. And under the provisions of said regulations all American citizens in the employ of the United States in the service of said Canal, upon the Isthmus of Panama, were provided with free quarters, builded, as aforesaid, with public monies appropriated by Congress for such purpose. That on date of August 24, 1912, while

said regulations for the construction of the
5 Panama Canal, adopted and promulgated in manner as aforesaid were still in force and effect, the Act of Congress known as the Panama Canal Act was enacted and approved. And by the Second Section of said Act it was expressly and especially made and provided as follows:

"That all laws, orders, regulations and ordinances adopted and promulgated in the Canal Zone by order of the President for the government and sanitation of the Canal Zone and the construction of the Panama Canal are hereby ratified and confirmed as valid and binding until Congress shall otherwise provide."

And by further provisions of said Act, the President was authorized in his discretion, to discontinue the Isthmian Canal Commission, and to thereafter complete, govern and operate the Panama Canal, and govern the Canal Zone, or cause them to be completed, governed and operated, through a governor of the Panama Canal, and such other persons as he might deem competent to discharge the various duties connected with the completion, care, maintenance, sanitation, operation, government and protection of the Canal and the Canal Zone. And the President was further authorized to maintain and operate, through the Panama Railroad Company, or otherwise, dry docks, repair shops, yards, docks, wharves, warehouses, storehouses and other necessary facilities and appurtenances for the purpose of providing coal and other materials, labor, repairs and supplies for vessels of the Government of the United States, and incidentally, for supplying such at reasonable rates to passing vessels, in accordance with appropriations thereby authorized to be made from time to time by Congress as part of the maintenance and operation of the said Canal. And no other business, commercial operations,

or trafficing in the name and with the property of the United States, was authorized than that hereinabove set forth. And by Section Four of said Act, the power or authority of the President to fix, modify or change any of the conditions of employment upon the Isthmus of Panama, in the service of the Panama or the Panama Railroad, was limited to authority to fix, within certain limits, the wages and salaries or compensation of of all persons necessary for the completion, care, management, maintenance, sanitation, government, operation and protection of the Panama Canal and of the Canal Zone.

And Congress, since the passage of the Pan-
6 ama Canal Act, has made no provision changing or modifying the regulations, adopted and promulgated as aforesaid by the President or by his order, for the construction of the Panama Canal, or changing the conditions of employment, or curtailing any of the privileges granted to employees in the service of the Panama Canal and of the Panama Railroad upon the Isthmus of Panama; and Congress has not authorized any one to change, annul, modify or repeal such regulations; and especially has Congress not authorized any one to collect rent for the houses and quarters builded, constructed and designed for the free housing and quartering of the said employees; nor has Congress authorized that such employees shall be charged rent for the occupancy of said houses, dwelling or quarters. And plaintiff says and alleges that such regulations, adopted and promulgated as aforesaid, are in full force and effect and binding upon the President, and upon the defendants herein, and upon all persons appointed by the President or by his authority for the care, maintenance, management, sanitation, operation, government and protection of the Panama Canal and of the Canal Zone, and for the auxiliary works and business authorized

by Congress as aforesaid, in connection with the operation and maintenance of the Panama Canal. And plaintiff further says and shows unto Your Honor, that every year since the completion and formal opening of the Panama Canal, Congress has appropriated great sums of the public monies of the United States for the work of operation, sanitation and maintenance of the Panama Canal; and of such sums so appropriated large amounts have been expended under authority of Congress for the construction and repairs of houses and quarters, builded, constructed, designed and intended for the free housing and quartering of employees in the service of the Panama Canal and of the Panama Railroad upon the Isthmus of Panama, and for no other purpose.

III.

And the plaintiff further says:

That the United States of America, through the President, the Isthmian Canal Commission, or the Governor of the Panama Canal, by authority of Congress,
7 in order to obtain the services of plaintiff and of all of those in whose behalf he sued, and to induce him and them to leave their homes and employment in the United States and enter the employment of the United States in the service of the Panama Canal and of the Panama Railroad, upon the Isthmus of Panama, held out, offered, promised, contracted and agreed to and with plaintiff and to and with each and every one in whose behalf he sues, that if plaintiff and all of such persons would come to the Isthmus of Panama and enter such service and employment, then, and in such event, in addition to the compensation fixed for such service by the President, or by his authority, during such employment, the United States, through

the Panama Canal, would furnish to plaintiff and to all of those in whose behalf he sues, free quarters containing all necessary articles of furniture, such as beds, mattresses, chairs, etc; and that to all of such persons who desired to bring their families to the Isthmus of Panama with them, free quarters for themselves and families, including all necessary articles of furniture, such as beds, mattresses, ranges, refrigerator, table, chair, etc. would be furnished by the United States through the Panama Canal, whenever such quarters were available upon the Isthmus of Panama. And plaintiff, and all others in whose behalf he sues, accepted in good faith such offer, promise and agreement, made to them by the United States through the President, the Isthmian Canal Commission and the Governor of the Panama Canal, by authority of Congress, as aforesaid, and did leave their homes, friends, opportunities and employment in the United States and came from the United States to the Isthmus of Panama for the purpose of entering the employment of the United States in such service as aforesaid; and plaintiff and those in whose behalf he sues are still in such employment. And upon the arrival of plaintiff and those in whose behalf he sues, at the Isthmus of Panama, free quarters were duly assigned and provided by the United States according to the said offer, promise and contract, made and accepted as aforesaid, and plaintiff and each and every one of those in whose behalf he sues are now in possession of and occupying the quarters and dwellings builded by the United States, with funds appropriated as aforesaid, for the purpose of housing and quartering all the employees
8 of the Panama Canal and of the Panama Railroad upon the Isthmus of Panama.

And plaintiff, and each and every one of those in whose behalf he sues, have faithfully carried out, performed and fulfilled all of their part of the said con-

tract, promise and agreement, and are ready, willing and able to continue to faithfully carry out and perform all of the conditions of the said contract.

IV.

That notwithstanding the fact that all the powers and authority of Congress and of the President are defined and limited by the Constitution of the United States of America, and that neither Congress nor the President has any power, right or authority to raise, collect, receive or accept any money or revenue for the United States save and except as provided by the Constitution, and notwithstanding the fact that neither Congress nor the President may engage the United States, or its property, in any business, commerce or traffic not provided for and defined by said Constitution, the President of the United States, in excess of his power and authority and contrary to law and in violation of the contract, promise and agreement made and entered into as aforesaid, by and between the United States and plaintiff, and those in whose behalf he sues; and in utter disregard of the provisions, limitations and inhibitions of the Constitution of the United States, did, on the 3rd day of December, 1921, make, sign and publish, a certain Executive Order which is in words and figures as follows:

"By virtue of the authority vested in me it is hereby ordered:

1. Pursuant to the provisions contained in paragraph 17 of the Executive Order of February 2, 1914, fixing conditions of employment governing employees of the Panama Canal and Panama Railroad on the Isthmus of Panama, a charge will be made for rent, fuel, electric

current, water, and services in connection with quarters, on and after January 1, 1922.

Rent.

2. The rental will be based on the present average depreciated value of the area occupied by the tenant, to be determined by the Governor of the Panama Canal, The rental will be sufficient to amortize the investment in quarters on the basis of a total average life of 36 years, to return five (5) per cent for amortization and interest on the investment, and in addition cover the amount fixed for expenditure for repairs due to ordinary wear and tear of buildings and for the disposal of garbage and other services necessary from a sanitary point of view. The rental for bachelor quarters and for nonhousekeeping quarters may be fixed to include all miscellaneous services which are rendered. The rental of buildings hereafter erected shall be fixed so as to conform with rentals theretofore charged for similar buildings.

3. Charges for fuel, electric current and water, will be based upon cost; where meters are not installed, the charge for water will be based upon average consumption, and the charge for current upon the number of lamps or other devices installed.

4. Miscellaneous work, such as repainting interior of houses, repairing electric fixtures, breakage in screens, furniture and stoves, plumbing, etc., and the cutting of grass and trimming of hedges around quarters, will be done upon request of tenants and charges for such services will be made on basis of cost. And repair made necessary by reason of a tenant's misuse of the premises or any property therein, will be made by

the Panama Canal and the cost therefor collected from such tenant.

5. The Governor of the Panama Canal is charged with the duty of issuing such instructions as may be necessary to carry out this order and to fix charges as herein outlined, subject to the general instructions provided.

(Sgd.) WARREN G. HARDING.

The White House,
December 3, 1921."

And defendant J. J. Morrow, in his capacity as Governor of the Panama Canal is about to, and will, unless prevented by an order and decree of this Honorable Court, carry out and put into effect said unlawful, unconstitutional, unjust and inequitable Executive Order and to make and cause a breach of the contract, entered into, as aforesaid by and between the United States of America and plaintiff and each and every employee of the United States engaged in the service of the Panama Canal and of the Panama Railroad, upon the Isthmus, to the great and irreparable injury and damage of plaintiff and of all of those in whose behalf he sues; and said defendant has already issued an Official Circular for the Panama Canal dated at Balboa Heights, December 15, 1921, and bearing official number 627-31, (a copy whereof is hereunto attached, marked "plaintiff's exhibit A", and made a part of this Bill of Complaint), for the purpose of putting said Executive Order into force and effect against plaintiff and against all of those in whose behalf he sues.

And plaintiff, and each and every one of those
10 in whose behalf he sues, have been employed in the service of the Panama Canal, and of the

Panama Railroad, and have rendered service to the United States in such employment during the month of December, 1921, at salary, wages or compensation fixed by the President or by his authority, in accordance with the provisions of Sec. 4 of the Act of Congress known as the Panama Canal Act, of August 24, 1912. And the money for the payment of such salaries, wages or compensation has been appropriated by Congress out of the public monies of the United States, and is available to the defendants for the purpose of paying such wages, salaries or compensation, and for such purpose only. But defendants, J. J. Morrow, has issued orders and instructions unto defendants H. A. A. Smith and R. W. Glaw, Auditor and Paymaster of the Panama Canal respectively, to divert certain part or parts of said money, appropriated and available as aforesaid, from the purpose for which the same has been appropriated by Congress, and, without the consent and against and over the will and protest of plaintiff, and of each and every one in whose behalf he sues, from such wages, salaries and compensation to become due and payable on date of January 1st, 1922, to deduct and withhold certain parts or sums of money as a direct federal taxation upon plaintiff, and upon each and every one of those in whose behalf he sues, for the purpose of raising revenue for the United States to amortize and give a profit in interest upon the investment of building the houses, dwellings and quarters constructed out of public monies of the United States, as above set forth, and to provide fund for the United States to assist in the works of sanitation, maintenance and operation of the Panama Canal and of the Canal Zone.

And defendants H. A. A. Smith and R. W. Glaw, Auditor and Paymaster of the Panama Canal respectively, are about to and will carry out and enforce such orders and instructions, and will forcibly deduct and

withhold certain parts of the wages, salary or compensation due unto the employees in the service of the Panama Canal and of the Panama Railroad upon the Isthmus of Panama, and will collect such direct tax from them for the purpose of raising revenue for the operations of the United States upon the Canal Zone,

and to give a profit to the United States upon
11 the building of quarters for the said employees,

except and unless prevented from performing such unlawful and unconstitutional act by an Order or Decree from this Honorable Court.

And defendant J. J. Morrow, Governor of the Panama Canal, has issued orders and instructions to various of his subordinates and employees, and to defendants H. A. A. Smith and R. W. Glaw, Auditor and Paymaster of the Panama Canal respectively, that, from the salaries, wages and compensation to become due and payable to the various employees in the service of the Panama Canal and the Panama Railroad, upon the first pay period of the month of February, 1922, they deduct and withhold certain amounts and sums of money, to be fixed by him or by his direction, without authority of Congress, for the payment of fuel, electric current and water, furnished by the United States unto said employees free of charge as an established privilege and custom; said deduction to be a direct taxation upon plaintiff and upon those in whose behalf he sues, for the purpose of raising revenue for the United States to assist in the the property of the United States of America, and operation and maintenance of the Panama Canal.

And defendant J. J. Morrow, Governor of the Panama Canal, has ordered and instructed his subordinates, employees and agents, and defendants H. A. A. Smith and R. W. Glaw, Auditor and Paymaster as aforesaid, that upon the first pay period of each and every succeeding month after January and February, 1922, as afore-

said, they continue to make said deductions and collections for the purpose of amortization and profit for the United States and to raise revenue for the operation and maintenance of the Panama Canal; and said defendants, and their various subordinates, employees and agents, unless prevented and estopped therefrom by an Order and Decree of this Honorable Court, will continue monthly to unlawfully withhold part or parts of said salaries, wages or compensation, as aforesaid, to the great and irreparable injury and damage of plaintiff and those in whose behalf he sues.

And defendant J. J. Morrow, Governor of the Panama Canal, without any authority of Congress and without the consent of the United States, has threatened and is about to, and will, unless prevented therefrom by an order or decree of this Honorable Court, lease, rent and let out, to persons not connected with the Government of the United States, or in its employ, certain buildings, dwelling houses and quarters, erected by the United States with funds appropriated by Congress for the operation, construction and maintenance of the Panama Canal, and for the housing and quartering of employees of the United States engaged in such service. And said defendant is about to and will constitute the Panama Canal into a real estate agency, operated as a commercial business for and on behalf of the United States, contrary to the limitations and inhibitions of the Constitution of the United States, and without any authority in law, to the great and irreparable injury of plaintiff, and of those in whose behalf he sues, and to the injury of every citizen and tax payer of the United States, with whose money such buildings were erected for a specific and designated purpose and for such purpose only.

V.

And plaintiff shows unto your Honor that plaintiff, and those in whose behalf he sues, are without any speedy or adequate redress at law, and if such unlawful acts are performed by the defendants, plaintiff and those in whose behalf he sues will be without any speedy or adequate recourse or remedy at law, because if such monies are collected and covered into the Treasury or Public Funds of the United States, they cannot be returned to plaintiff and others save and except Congress enacts a special law permitting suits to be brought against the United States for such purpose; nor could plaintiff and those in whose behalf he sues recover damages from the defendants, for the reason that the total amount of such deductions will, if permitted to be made, amount to about $500,000.00 per year, more or less, and defendants are unable to pay such judgment if recovered against them.

Wherefore, being without any remedy or speedy or adequate redress at law, plaintiff comes into this Court of Equity, where matters of this kind are cognizable, and respectfully prays that a Preliminary Injunction, as provided by the Code of Civil Procedure of the Canal Zone, be at once granted and issued, commanding the said J. J. Morrow, Governor of the Panama Canal, his subordinates, agents, employees and representatives, to refrain and desist from complying or attempting to comply with the directions contained in the aforesaid Executive Order of December 3, 1921, and to further refrain from putting into force and effect the provisions of said unlawful Executive Order; and to further refrain and desist from putting into operation, or from attempting to put into operation the orders, provisions, and directions contained in his Official Circular No. 627-31, as aforesaid; and to refrain from col-

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lecting or attempting to collect, by payroll deductions or in any other manner, charges against employees of the United States upon the Canal Zone, or Isthmus of Panama, or from withholding, or attempting to withhold from salaries, wages or compensation earned by such employees, any sum or sums of money whatsoever in the payment of charges against such employees as rent or for the occupancy of quarters belonging to the United States, or as expense for sanitation, or to provide a fund for amortization or interest upon the investment of building such quarters; or as charges for fuel, electric current or water, the property of the United States, furnished to and consumed by such employees; and commanding him to refrain from renting, letting or leasing, or attempting to rent, let or lease, any houses, dwellings, quarters or buildings, erected upon the Isthmus of Panama from funds appropriated by Congress for the construction, operation, maintenance, government, sanitation or protection of the Panama Canal or of the Canal Zone for the purpose of housing or providing quarters for employees of the United States, to any person, or persons whomsoever, not connected with the Government of the United States of America or in its employ or service. And commanding defendants H. A. A. Smith, Auditor of the Panama Canal, and R. W. Glaw, Paymaster of the Panama Canal, their subordinates, employees, agents and representatives, that they refrain from collecting, deducting, withholding or in any manner receiving, or from attempting to collect, deduct, withhold or receive, any sum or sums of money whatsoever, earned as wages, salary or compensation by employees in the service of the Panama Canal or of the Panama Railroad, for the purpose of covering charges as established in the above quoted Executive Order and the Official Circular of the Panama Canal, No. 627-31, hereto attached as exhibit "A"; and that

they refrain and desist from carrying out or putting into effect or from attempting to carry out or put into effect any of the provisions, orders, or instructions contained in said Executive Order or Official Circular
14 No. 627-31, or any orders or instructions whatsoever which they have received from the Governor of the Panama Canal, to collect, deduct or withhold any sums of money from such employees for the payment of charges established in said Executive Order and Official Circular.

And that upon a final hearing of this cause being had, the said J. J. Morrow, Governor of the Panama Canal, H. A. A. Smith, Auditor of the Panama Canal, and the said R. W. Glaw, Paymaster of the Panama Canal, their successors in office or interest, and their subordinates, employees, agents or representatives, and the subordinates, employees, agents and representatives of the successors in office or interest of the said defendants, be finaly, perpetually and forever enjoined, by Order and Decree of this Honorable Court from directly, or indirectly, charging, collecting, deducting, withholding or receiving, any money or monies whatsoever, or any part or parts of any wages, salary or compensation from plaintiff and from any and every employee of the United States in the service of the Panama Canal or of the Panama Railroad upon the Isthmus of Panama, for or as a charge for rent, occupancy, repairs, upkeep, interest upon investment, amortization or depreciation of any house, building or quarters, the property of the United States of America, and erected or constructed from funds appropriated by Congress from the Treasury of the United States, or from public monies of the United States, for the construction, operation, maintenance, sanitation, government or protection of the Panama Canal or of the Canal Zone; or as a charge for sanitation, collection of gar-

bage, cutting of grass, trimming of hedges, plumbing, or any work of maintenance or sanitation of the Panama Canal, the Canal Zone or any of the auxiliary works authorized by Congress; and that they, and all of them, be finally, perpetuaally and forever enjoined from putting into force and effect upon the Canal Zone, any of the provisions, orders or directions of said Executive Order of the President of December 3, 1921; and that they, and all of them be finally, perpetually and forever enjoined from leasing, renting, or letting out, to any person or persons whomsoever not connected with the Government of the United States of America, or in its employ, any house, dwelling, or building used for quarters, the property of the United States and erected with monies appropriated by Congress for the construction, operation or maintenance of the Panama Canal for the purpose of providing quarters for employees of the United States upon the Isthmus of Panama.

And that defendants may be decreed to pay the costs of this suit, and that plaintiff, and all of those in whose behalf he sues, may have such other and further relief as to this Honorable Court may seem meet and agreeable to equity.

(Sgd.) HARVEY McCONAUGHEY,
Plaintiff.
WM. C. MacINTYRE,
Solicitor for plaintiff.

United States of America,
Canal Zone, SS.
Ancon.

Harvey McConaughey, of lawful age, being first duly sworn according to law, on oath deposes and says:

I am the plaintiff named in the above mentioned complaint, and I have brought this suit for myself and for and on behalf of all other employees of the United States in the service of the Panama Canal and of the Panama Railroad, upon the Isthmus of Panama.

I have read and signed the said complaint and know the contents thereof, and the same is true, save as to those matters therein alleged upon information and belief, and as to those matters and things I verily believe it to be true.

(Sgd.) HARVEY McCONAUGHEY,
Affiant.

Subscribed and sworn to before me at Ancon, C. Z., this 24th day of December, A. D. 1921.

(Sgd.) F. H. SHEIBLEY,
Actg. Clerk of the Court.

Filed December 24, 1921, in the office of the Clerk of the District Court, Canal Zone. (Sgd.) E. M. Goolsby, Clerk.

16 PLAINTIFF'S EXHIBIT "A".

The Panama Canal,
Executive Office.

Balboa Heights, C. Z., December 15, 1921.

Circular No. 627-31.

Superseding all Circulars of the 627 series.

Quarters for Gold Employees and American Citizens on the Silver Roll.

1. Pursuant to the provisions of the Executive Order of December 3, 1921, rent will be charged for all quarters occupied by gold employees of The Panama Canal, the Panama Railroad, other departments of the United States Government, contractors, or others who may be permitted to occupy such quarters, effective January 1, 1922, and the following will govern the assignment of quarters and the collection of rent therefor. All previous circulars of the 627 series are hereby canceled.

Applications.

2. Applications for original assignment to quarters, or for transfer, must be made on the forms provided for that purpose, and should show the date of the employee's last entrance into the service, rate of salary, and the maximum and minimum rental he is willing to pay. This application must be approved by the head of the department in which the applicant is employed and certified by the Executive Office.

3. Applications for original assignment to quarters in a district will be placed on one list according to the

employee's total length of satisfactory service, and where the length of service is equal, the salary received will determine, and opposite each applicant's name will be indicated the maximum and minimum rate of rental the employee states in his application he is willing to pay.

4. The service of employees who resigned from The Panama Canal or Panama Railroad to enter military or naval service during the European War, and who were reinstated in their positions within 120 days from date of honorable discharge, is considered continuous for the purpose of applying for quarters; while those reporting for duty after 120 days are given credit for time while in military or naval service.

5. An employee may, at the request of the head of his department, file an application for family quarters at, or transfer his application to, a district other than that in which he is employed.

6. Applications for transfer of quarters within a district must be submitted to district quartermasters on regular form through the head of department and the Executive Office, and the rules governing original assignments will be applied. Applications for transfer from without a district will be placed on the assignment list according to the date of employee's total length of satisfactory service, the same as applications for assignment within a district. Supplemental change may be made in description of quarters applied for, by writing directly to the district quartermaster.

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7. Preference will be given to families with greatest number of children above two for transfer to quarters

designated for use of families with large number of children, provided applicant had already received a regular assignment, or is at head of list for assignment.

8. Lists showing all applications on file for each district will be posted in the office of the district quartermaster and will be open for inspection.

9. The wife constitutes the family of an employee, and no consideration can be given applications for family quarters for occupancy by other members of a family than the wife, except as herein provided.

Assignments.

10. An applicant on the waiting list for family quarters, when he becomes eligible for assignment, will be given an opportunity to refuse two separate and distinct tenders of quarters, the rental of which is within the limits he states in his application. If he does not accept the second tender, his application will be canceled. An applicant will not be offered an assignment to a house which rents for more or less than the limit stated in his application.

11. Official quarters will be assigned only on approval of the Governor.

12. When an officer of the Army or Navy is detailed for duty with The Panama Canal, his application for quarters will be placed at the head of the list. After acceptance of original assignment, applications for transfer will be placed on list according to total length of satisfactory service with The Panama Canal or Panama Railroad Company.

13. Family quarters will be assigned to widow or widower employees having dependent children residing with them, in the same order as to married employees. Dependent children under this rule will not include sons more than 18 years of age in normal health, nor sons or daughters who are working and earning $40 per month or more.

14. Family quarters will be assigned to bachelors with dependent mothers in certain meritorious cases where absolute dependency is shown. Applications for such quarters must be approved by the Governor before acceptance. After approval they will be listed as regular applications for married employees.

15. Provisional assignment to family quarters may be made for periods not to exceed six months, to employees not otherwise provided for, after regular applicants have been tendered quarters. Applications for such assignments will be considered in the following order:

(a) Employees having dependent relatives only.

(b) Employees having nondependent near relatives only; i. e., children, parents, sisters, and brothers.

(c) Other employees regardless of dependents, or relatives.

(d) Aliens on the gold roll.

18 16. All family quarters distinctly and definitely within hospital reservations shall be regarded as for use of hospital physicians and nurses, and they will be given preference in assignment thereto.

The assignment shall remain under the jurisdiction of the Chief Quartermaster.

17. Where quarters have been constructed as an integral part of post offices, fire stations, police stations, railway stations, hotels, telephone exchanges, filtration plants, or in cases of quarters especially constructed by The Panama Canal in isolated localities adjacent to any activities, the operation of which necessitates the quartering of employees in close proximity thereto, they will be assigned without regard to general rules.

18. The rules applying to assignment of family quarters, their transfer, retention, etc., shall be applicable to bachelor quarters so far as practicable.

19. Exchanges in assignment between employees in different districts will be permitted when such exchanges do not interfere with the rights of other employees. These exchanges will be referred to the Chief Quartermaster for approval.

Occupation of Quarters.

20. Employees will be required to accept or reject tender of quarters within five days from date of tender.

21. When an assignment has been made in conformity with these rules, it will stand until the quarters are accepted or rejected by the employee, or until the time within which to accept or reject the tender has expired. When an employee forfeits family quarters through failure to occupy them within the prescribed time, no new application for family quarters shall be filed within 10 days after the quarters previously assigned are forfeited or released.

22. When family quarters are assigned to an employee whose family is not on the Isthmus, he will be allowed 60 days from the date of tender in which to occupy the quarters, except that an employee granted leave at the time he is tendered quarters may hold them 30 days in excess of leave granted. This does not apply in the case of transfers. Rent will be charged for quarters held.

Vacation of Quarters.

23. Employees on termination of service may occupy quarters for the balance of the month, provided rent for the entire month has been paid. Further extension may be granted on payment of rent in advance on special approval. Rent will be charged for all the time that quarters are held under this provision.

24. Family quarters may be held during the absence on leave of the employee to whom assigned, or his family or both simultaneously, for a total of six month each service year, but not to exceed six months in any one continuous period. Employees will be required to notify the district quartermaster at expiration of leave period and on date they reoccupy quarters of the total time absent during that period. (Hospital treatment excepted.) After a total of six months' allowance in one service year is used, quarters will be forfeited. Rent will be charged for such time.

19 Rental Rates.

25. Rates of rent for all quarters will be fixed by the Chief Quartermaster with the approval of the Governor, and a list showing approved rates for all quarters will be posted on bulletin boards at the offices of the district quartermasters.

26. Rentals of quarters will be collected in advance by payroll deduction and without penalty.

27. Miscellaneous charges for light, water, fuel, etc., incurred from January 1 to January 20, inclusive, will be deducted from the first payments to employees made during February, and the periods from then on will run from the 21st of one month to the 20th of the following month, both dates inclusive. Deductions will be made accordingly.

28. Employees whose basic rate of pay includes quarters, and those who are required for the good of the service to live in specially designated quarters where employed, will be granted such quarters free of charge or at such special rates as may be approved by the Governor from time to time.

29. Rent will start on the day quarters are ready for occupancy as shown in the assignment (fractional parts of the month will be figured at one-thirtieth of the monthly rate per day), and will continue until quarters are released.

30. When quarters are vacated a refund for the fractional part of the month will be made to the employee of one-thirtieth of the amount paid for rental for each day remaining in the month. Refunds will not be made for fuel, but employees may dispose of any fuel on hand to other employees if desired.

31. An employee may, with the approval of the Chief Quartermaster, sublet his quarters during his absence on leave, or sublet a part of them while he and his family occupy the other part. When so sublet, however, the employee will be responsible for the quarters

as well as the payment of rental and other fixed charges connected with the occupancy of such quarters.

32. When bachelors are forced to occupy family apartments, for the good of the service, as determined by the Chief Quartermaster, bachelor room rates will apply.

33. An employee whose duties require him to be quartered at more than one town shall pay rent only for the quarters in the town considered his headquarters, and when this can not be determined, he shall pay only the higher rental. When family quarters are occupied in such case, the rate for the family quarters will govern.

34. An employee occupying bachelor quarters in the immediate vicinity of his work and holding an assignment to family quarters elsewhere, solely for his convenience and at his request, will be charged full rental for both quarters.

35. An employee who is regularly assigned to family quarters at his place of work will not be required to pay rent for bachelor quarters while awaiting assignment to family quarters at a new station to which he is permanently transferred. If transferred temporarily for the good of the service, no additional rental will be charged for the bachelor quarters occupied temporarily.

20 **Fuel, Water, Electric Current, and other Services.**

36. The rents established for quarters include repairs to buildings occupied as quarters and removal of garbage, and do not include the use of electric current, water, or the furnishing of fuel, and separate charges

will be made therefor at such rates and subject to such conditions as may be approved by the Governor. Care of the grounds around quarters will be at the expense of occupants.

37. The use of electric appliances in quarters will be permitted under such terms and conditions as shall be determined and publihed from time to time.

Furniture.

38. The allowance of furniture for regular family quarters will be as follows:

1 range,
2 kitchen chairs,
1 chiffonier,
1 sideboard,
1 double mattress,
1 kitchen table,
2 center tables,
1 dresser,
1 double bed,
1 refrigerator,
6 dining chairs,
1 dining table,
3 rocking chairs.

39. In houses designated for use of Canal officials, the following additional articles are authorized:

3 dining chairs,
1 Morris chair,
2 towel racks,
1 parlor desk,
2 parlor chairs,

1 chiffonier,
1 porch swing,
1 parlor wicker rocker,
1 serving table,
1 dresser,
1 double porch seat.

40. The furniture allowance for bachelor quarters, per room, will be as follows:

1 single bed,
1 chiffonier,
1 single mattress,
1 table,
1 straight chair,
1 dresser,
1 rocker.

41. Nonhousekeeping quarters will be provided such furniture as may be available, but in no case more than is provided above for regular family quarters.

42. The issue of beds, mattresses, and one dresser in excess of this allowance, is authorized to families with children. Employees moving from one house to another in the same ditsrict will be permitted to take with them, at their own expense, mattresses and refrigerators.

43. When an employee living in family quarters desires to use his own furniture exclusively, a reduction of 10 per cent per month will be made in the rent. No reduction will be made, however, unless all Panama Canal furniture including refrigerators, but excepting stoves, is released.

44. Maintenance and upkeep of furniture will be at the expense of the individual occupying the quarters

where used, and such furniture will be turned over on release of the quarters in as good condition as when received, barring ordinary wear and tear. Furniture needing repairs may be exchanged at fixed rates per piece, which rate will cover reconditioning and delivery.

21 Rental of Quarters to Nonemployees.

45. When available, quarters may be rented, with the approval of the Chief Quartermaster, to other than Canal employees when their business or employment is confined to the Canal Zone, but quarters will not be considered available as long as there are Canal applicants therefor. Such assignments may be canceled on 30 days' notice when quarters are needed for Canal or Panama Railroad employees. The following surcharges will be added to the regular schedule of rentals, when quarters are rented to other than employees of The Panama Canal or Panama Railroad Company:

(a) Contractors, and their employees, officers and enlisted men of the Army, Navy, and Marine Corps, officers and employees of other branches of the United States Government, will be granted the same rates applicable to Canal employees.

(b) Outside parties who have no connection with The Panama Canal, the Panama Railroad Company, contractors, or the various branches of the United States Government service: Bachelor quarters, 100 per cent; family quarters, 200 per cent.

46. Tariff rates for individuals and companies will apply for electric current, water, fuel, etc., furnished, when the surcharges mentioned in the foregoing section are added to the regular rental.

47. Occupants will not be permitted to make any alterations on quarters, without the specific approval of the Chief Quartermaster.

48. Occupants of quarters will be held responsible for any damage beyond ordinary wear and tear to the building or property or any parts thereof by carelessness or neglect on their part, and will be required to reimburse The Panama Canal in full for such damage in an amount equal to the cost of making necessary repairs or replacing the damaged part or parts as determined by the Chief Quartermaster.

JAY J. MORROW,
Governor.

Filed Dec. 24, 1921, in office of the Clerk of the District Court, Canal Zone. (Sgd.) E. M. Goolsby, Clerk.

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22 ORDER TO SHOW CAUSE.

United States of America, Canal Zone.

In the United States District Court for the Canal Zone, Balboa Division.

Harvey McConaughey, etc.,
Plaintiff,
vs. No. 540 Civil.
J. J. Morrow, Governor of the Panama Canal, et als.,
Defendants.

Now upon reading and filing the verified Complaint of the Plaintiff, and it appearing unto the undersigned Judge that said Complaint states a cause of action,

and that this is a case in which it is proper that a Preliminary Injunction be granted and issue, now, upon motion of Mr. William C. MacIntyre, attorney for Plaintiff, made and heard ex parte in my chambers at Ancon, Canal Zone it is

ORDERED;

That the said Defendants, J. J. Morrow, Governor of the Panama Canal, H. A. A. Smith, Auditor of the Panama Canal, and R. W. Glaw, Paymaster of the Panama Canal, be and appear, in person or by counsel, before me, at a sitting of the United States District Court for the Canal Zone, to be held in the Court House, at Ancon, C. Z., at 9:15 o'clock, December 28, 1921, in the morning of said day, then and there to show cause, if any they have, why the Preliminary Injunction in said Complaint prayed, should not be granted.

And it is further ordered that a copy of this order, with a copy of said verified Complaint attached, be served by the U. S. Marshal for the Canal Zone, or by his Deputy, upon the Governor of the Panama Canal, and the other defendants in said complaint named, and that said Marshal, or his deputy shall return this order into the office of the Clerk of this Court, not later than December 27, 1921.

Given in Chambers, at Ancon, Canal Zone, this 24th day of December, 1921.

(Sgd.) CHARLES KERR,
(Seal) United States District Judge.

Attest:

F. H. SHIEBLEY,
Acting Clerk of Court.

23 (Indorsement): Served on J. J. Morrow, Governor of The Panama Canal, H. A. A. Smith, Auditor of The Panama Canal, and R. W. Glaw, Paymaster of The Panama Canal, by delivering to each a true copy of the Complaint and Order to Show Cause, at Balboa Heights, Canal Zone, December 27, 1921.

(Sgd.) HORACE D. RIDENOUR,
U. S. Marshal.
By FRANK T. HAMLIN,
Deputy U. S. Marshal.

Marshal's Fees:

Service	$3.00
Mileage	.60
Additional words in Complaint	14.40
	$18.00

Filed December 27, 1921, in the office of the Clerk of the District Court, Canal Zone. (Sgd.) E. M. Goolsby, Clerk.

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24 MINUTES.

On this twenty-eighth day of December, A. D., 1921, the United States District Court of the Canal Zone is duly convened pursuant to adjournment in the Court House at Ancon, in the Canal Zone, the same being the tenth session of the December term, 1921, of the said Court for the Division of Balboa.

Presiding, Honorable Charles Kerr, United States District Judge; present Honorable A. C. Hindman, District Attorney, Honorable Horace D. Ridenour, Marshal, by his deputy, Frank T. Hamlin; and the Clerk of the

Court, by deputy clerk, F. H. Sheibley; and the following proceedings are had, to-wit:

Harvey McConaughey, for himself and in behalf of all other employees of the Panama Canal and the Panama Railroad, on the Isthmus of Panama,

Plaintiffs,

vs. No. 540.

J. J. Morrow, Governor of the Panama Canal; H. A. A. Smith, Auditor of the Panama Canal; R. W. Glaw, Paymaster of the Panama Canal; and against the successors in office of all of the said parties;

Defendants.

INJUNCTION.

This day the parties to this cause are in open Court, respectively by their attorneys, and the case being called for hearing on the defendant's motion to dismiss, and having been heard thereon, the Court announces that the case will be submitted on the question of jurisdiction, and that judgment of the Court will be rendered as soon as the Court can reach a conclusion.

There being no other business before the Court, Court is adjourned until January 3, 1922, at 9:15 a. m.

25 MOTION TO DISMISS.

United States of America, Canal Zone.

In the District Court in and for the Division of Balboa, Canal Zone.

Harvey McConaughey, for himself and in behalf of all other employees of The Panama Canal and the Panama Railroad, on the Isthmus of Panama,
Plaintiff,

vs. Civil No. 540.

J. J. Morrow, Governor of The Panama Canal; H. A. A. Smith, Auditor of The Panama Canal; R. W. Glaw, Paymaster of The Panama Canal, and against the successors in office of all of the said parties;
Defendants.

Come now the above-named defendants, J. J. Morrow, Governor of The Panama Canal, H. A. A. Smith, Auditor of The Panama Canal, and R. W. Glaw, Paymaster of The Panama Canal, by their solicitor, A. C. Hindman, and appearing especially for the purposes of this motion and for no other, and without submitting to the jurisdiction of the Court, move this Honorable Court to quash the order to show cause heretofore issued, and to dismiss the bill of complaint heretofore filed in the above-entitled cause, for the following reasons, to-wit:

1.

That this Court is without jurisdiction of the subject matter of the said bill, in that it appears from said bill that it is a suit to enjoin the collection of funds for

and on behalf of the United States and for deposit in the Treasury of the United States, and is, therefore, in effect a suit against the United States.

2.

That this Court is without jurisdiction of the subject matter of the said bill and of the persons of these defendants, for the reason that it appears from said bill that said defendants are officials of the Executive Branch of the Government of the United States, and in the matters complained of in said bill are acting in their respective official capacities by and under the direction of the President of the United States. That this Court has no jurisdiction to enjoin the President of the United States, or any other person carrying out his orders in their official capacities.

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3.

That the Executive Branch of the United States Government and the Judicial Branch of the United States Government are co-ordinate branches, and there is no jurisdiction in this Court to enjoin a co-ordinate branch of the United States Government in the exercise of its executive discretion.

A. C. HINDMAN,
Solicitor for Defendants.

Filed December 28, 1921, in the office of the Clerk of the District Court, Canal Zone, (Sgd.) E. M. Goolsby, Clerk.

27 MINUTES.

On this 5th day of January, A. D. 1922, the United States District Court of the Canal Zone is duly convened pursuant to adjournment in the Court House at Ancon, in the Canal Zone, the same being the second session of the January term, 1922, of the said Court for the Division of Balboa.

Presiding, Honorable Charles Kerr, United States District Judge; present Hon. J. J. McGuigan, Assistant District Attorney, Hon. Horace D. Ridenour, Marshal, by his Deputy, Frank T. Hamlin; and the Clerk of the Court, by deputy Clerk, F. H. Sheibley; and the following procedings are had, to-wit:

Harvey McConaughey, for himself and in behalf of all other employees of the Panama Canal and the Panama Railroad, on the Isthmus of Panama,
Plaintiffs,

vs. No. 540.

J. J. Morrow, Governor of the Panama Canal; H. A. A. Smith, Auditor of the Panama Canal; R. W. Glaw, Paymaster of the Panama Canal; and the successors in office of all of the said parties;
Defendants.

The Court this day renders and files its Opinion on the motion to dismiss interposed by the defendants, and said motion is sustained.

Whereupon plaintiff by his attorney, William C. MacIntyre, prays that he be allowed to note and reserve his exceptions to the ruling of the Court sustaining said motion; and the Court orders that his said exceptions

may be noted and reserved, and made a part of the record herein by his Bill of Exceptions.

Whereupon the Court enters his final judgment herein, ordering the dismissal of this action, which said final judgment is in words and figures as follows:

(Omitting Caption).

And now the Court having filed its opinion and made its order herein, sustaining defendant's Motion to Dismiss, it is therefore,

Ordered, adjudged and decreed, that this cause be and the same is hereby dismissed, without costs.

Given in open Court, at Ancon, C. Z., this 5th day of January, 1922.

(Sgd.) CHARLES KERR,
United States District Judge.

28 And thereafter, plaintiff by his said attorney, prays that he may note and reserve to said final judgment, order and decree all of the exceptions already reserved by him to the ruling of the Court in sustaining the motion to dismiss; and the Court orders that all of said exceptions may be noted and reserved by Bill of Exceptions to be filed herein and made a part of the record in this cause.

And thereafter, plaintiff by his attorney, presented to the Court for approval his Bill of Exceptions herein, and the Court orders that the same be approved and filed as part of the record herein, which is accordingly done.

And now comes the plaintiff by his counsel and prays the Court to be allowed to appeal from said final decree and judgment to the United States Circuit Court of

Appeals for the Fifth Circuit, and files his prayer for appeal accompanied by his affidavit on appeal and his assignments of error; and he likewise prays that he may be allowed a Writ of Error in this cause from the said United States Circuit Court of Appeals for the Fifth Circuit.

And the Court grants said appeal and writ of error and signs in open Court the orders therefor, and the attorney for the defendants waives any notice of the application for appeal and writ of error.

And thereafter, the plaintiff by his said attorney moves the Court for a bond to act as supersedeas bond, whereupon the Court holds and rules that he is without authority or jurisdiction to fix a supersedeas bond in this cause. Whereupon plaintiff by his said attorney moves the Court that plaintiff be granted a restraining order, restraining defendants from covering into the Treasury of the United States or paying into the public funds of the United States any monies which may be withheld or deducted from the salaries or wages of plaintiff and his co-plaintiffs, pending final decision of this cause upon appeal. Whereupon the Court overrules said motion, and states that the Court being without jurisdiction in this cause is without jurisdiction to make or enter any order herein against the defendants.

Whereupon plaintiff by his said attorney prays the Court to fix the amount of the bond on appeal, which the Court thereupon fixes in the sum of five hundred dollars ($500.00), and the Court furthermore orders that said bond shall be signed by such sureties as may be approved by the Court.

The pleadings, motions, and orders herein made are in the following words and figures, to-wit:

29 OPINION OF COURT ON MOTION TO DISMISS.

United States of America.

[Figure of Eagle.]

United States District Court in and for the Canal Zone Balboa Division.

Harvey McConaughey, for himself and in behalf of all other employees of The Panama Canal and the Panama Railroad, on the Isthmus of Panama,
Plaintiff,
vs. Civil No. 540

J. J. Morrow, Governor of The Panama Canal; H. A. A. Smith, Auditor of The Panama Canal; R. W. Glaw Paymaster of The Panama Canal; and against the successors in office of all of the said parties;
Defendants.

The plaintiff, on behalf of himself and all others similarly situated, has filed an action against J. J. Morrow, Governor of the Canal Zone; H. A. A. Smith Auditor, and R. W. Glaw, Paymaster, seeking to enjoin them from deducting any portion of their pay a employees of The Panama Canal or the Panama Railroad, for rentals and other charges, fixed by the Cana Zone authorities, pursuant to an order of the President of the United States, in an Executive order of the President bearing date of the 3rd of December, 1921, which order is in the words and figures following:

"By virtue of the authority vested in me it is hereby ordered:

1. Pursuant to the provisions contained in paragraph 17 of the Executive Order of February 2, 1914, fixing conditions of employment governing employees of the Panama Canal and Panama Railroad on the Isthmus of Panama, a charge will be made for rent, fuel, electric current, water, and services in connection with quarters, on and after January 1, 1922.

Rent.

2. The rental will be based on the present average depreciated value of the area occupied by the tenant, to be determined by the Governor of the Panama Canal. The rental will be sufficient to amortize the investment in quarters on the basis of a total average life of 36 years, to return five (5) per cent for amortization and interest on the investment, and in addition cover the amount fixed for expenditure for repairs due to ordinary wear and tear of building and for the disposal of garbage and other services necessary from a sanitary point of view. The rental for bachelor quarters and for nonhousekeeping quarters may be fixed to include all miscellaneous services which are rendered. The rental of buildings hereafter erected shall be fixed so as to conform with rentals theretofore charged for similar buildings.

3. Charges for fuel, electric current and water, will be based upon cost; where meters are not installed, the charge for water will be based upon average consumption, and the charge for current upon the number of lamps or other devices installed.

4. Miscellaneous work, such as repainting interior of houses, repairing electric fixtures, breakage in screens, furniture and stoves, plumbing, etc., and the cutting of grass and trimming of hedges around quarters, will be done upon request of tenants and charges for such services will be made on basis of cost. Any repairs made necessary by reason of a tenant's misuse of the premises or any property therein, will be made by The Panama Canal and the cost therefor collected from such tenant.

5. The Governor of the Panama Canal is charged with the duty of issuing such instructions as may be necessary to carry out this order and to fix charges as herein outlined, subject to the general instructions provided.

(Sgd.) WARREN G. HARDING."

The defendants have moved to dismiss the action for the following reasons:

1. That this Court is without jurisdiction of the subject matter of the said bill, in that it appears from said bill that it is a suit to enjoin the collection of funds for and on behalf of the United States and for deposit in the Treasury of the United States, and is, therefore, in effect a suit against the United States.

2. That this Court is without jurisdiction of the subject matter of the said bill and of the persons of these defendants, for the reason that it appears from said bill that said defendants are officials of the Executive Branch of the Government of the United States, and in the matters complained of in said bill are acting in their respective official capacities by and under the direction of the President of the United States. That this Court has no jurisdiction to enjoin the President

of the United States, or any other person carrying out his orders in their official capacities.

3. That the Executive Branch of the United States Government and the Judicial Branch of the United States Government are co-ordinate branches, and there is no jurisdiction in this Court to enjoin a co-ordinate branch of the United States Government in the exercise of its executive discretion."

The purpose for which a statute is enacted will frequently aid in determining its true import and meaning. The Canal Zone Government is the result of a series of Congressional enactments, supplemented, from time to time, by sundry Executive Orders, promulgated pursuant to powers conferred on the President by the acts themselves.

The Canal Zone, as it is commonly designated, was acquired by the Government of the United States for a predetermined purpose. The acts of Congress and the Executive Orders issued pursuant to the powers conferred in such acts, are in aid of that purpose. All rules and regulations that have been established by legislative or executive enactment bear an immediate relationship to that purpose. From the outset both the legislative and executive branches of government have been involved. As to them it has been a co-
31 ordinated undertaking, each acting in harmony with the other. Congress has exercised little or no supervisory power, preferring rather to confer that power upon the executive. In consequence such rules and regulations as have been enacted and established from time to time for the construction, operation and maintenance of what is known as the Panama Canal have been promulgated by the executive, acting under direct authority from the legislative. The first act of

Congress, approved June 28, 1902, authorized the President to acquire from the New Panama Canal Company, of France, all of its rights, franchises, property, real and personal, its stock in the Panama Railroad, and everything of value which it possessed, for the stipulated sum of forty millions of dollars, and to acquire such additional territory as Congress directed, for the definite purpose of constructing an Isthmian waterway from the Caribbean Sea to the Pacific Ocean, and such additional territory as might in his judgment be necessary for the purposes intended. By this same act there was created an Isthmian Canal Commission for the sole purpose of enabling the President to construct such canal and the words appurtenant thereto, the supervisory power of the President over that Commission being provided in the following language:

"Said Commission shall in all matters be subject to the direction and control of the President, and shall make to the President annually, and at such other periods as may be required, either by law or by the order of the President, full and complete reports of all their actings and doings. * * *"

Section 2, of the Act of April 28, 1904, makes this further provision with reference to the powers of the President:

"That until the expiration of the Fifty-eighth Congress, unless provision for the temporary government of the Canal Zone be sooner made by Congress, all the military, civil, and judicial powers as well as the power to make all rules and regulations necessary for the government of the Canal Zone and all the rights, powers, and authority granted by the terms of said treaty to the United States shall be vested in such person or

persons and shall be exercised in such manner as the President shall direct for the government of said Zone and maintaining and protecting the inhabitants thereof in the free enjoyment of their liberty, property, and religion.

"Approved, April 28, 1904. (33 U. S. Stats., 429.)"

The Act of August 24, 1921, commonly designated as the "Panama Canal Act", confers additional powers upon the President, in addition to confirming his previous acts. Section 2 of that act provides as follows:

"That all laws, orders, regulations, and ordinances adopted and promulgated in the Canal Zone by order of the President for the government and sanitation of the Canal Zone and the construction of the Panama Canal are hereby ratified and confirmed as valid and binding until Congress shall otherwise provide. * * *"

In anticipation of the early completion of the undertaking, and in consequence thereof the abolition of the Isthmian Canal Commission, even greater powers were conferred upon the President at the conclusion of the functions of that Commission. Section 4 of that Act makes the following provision with reference thereto:

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"That when in the judgment of the President the construction of the Panama Canal shall be sufficiently advanced toward completion to render the further services of the Isthmian Canal Commission unnecessary the President is authorized by Executive Order to discontinue the Isthmian Canal Commission which, together with the present organization, shall then cease to exist; and the President is authorized thereafter to complete, govern, and operate the Panama Canal and govern

the Canal Zone, or cause them to be completed, governed and operated, through a governor of the Panama Canal and such other persons as he may deem competent to discharge the various duties connected with the completion, care, maintenance, sanitation, operation, government, and protection of the canal and Canal Zone. * *"

Section 7 defines the powers and duties of the governor as follows:

"That the governor of the Panama Canal shall, in connection with the operation of such canal, have official control and jurisdiction over the Canal Zone and shall perform all duties in connection with the civil government of the Canal Zone, which is to be held, treated, and governed as an adjunct of such Panama Canal. Unless in this Act otherwise provided all existing laws of the Canal Zone referring to the civil governor or the civil administration of the Canal Zone shall be applicable to the governor of the Panama Canal, who shall perform all such executive and administrative duties required by existing law. * * *"

A careful examination of this Act discloses the fact that while Congress reserves the right to modify existing rules and regulations, or to create new ones, there is nevertheless conferred upon the President, in reality, the entire management and control of the operation and government of the Canal and the Canal Zone, and all subsidiary agencies.

These various Acts have been alluded to and quoted from for the purpose of indicating the extent to which Congress has gone, from the first inception of this undertaking, in conferring upon the President not only unlimited control but unlimited discretion in all matters of construction, maintenance, operation and government.

Therefore, as incident to and as the coefficients of these powers, the further right to establish all rules and regulations that may be deemed necessary to effectuate the purpose intended by these grants of power, follows as a natural consequence.

From the foregoing recitals it will be seen that Congress, having by appropriate legislation authorized the building of the Panama Canal, and made all necessary appropriations therefor, in effect created the President of the United States an attorney in fact to
33 supervise and control the actual work of construction. This power was not granted to Theodore Roosevelt, or William H. Taft, or Woodrow Wilson, or Warren G. Harding, but to the President of the United States, thus delegating to the executive, in addition to the constitutional powers which he possessed, an unlimilted statutory power. Out of this anomoly has arisen the question which is now presented to the Court. It will not be argued that Congress can create an instrumentality of government and confer upon that instrumentality powers of legislation which have been exclusively delegated to it by the Constitution. Neither can it delegate such powers to any department of government already in existence. When the power to create and the power to execute are both lodged in the same functionary independent sovereignty ceases to exist. If, therefore, Congress actually, or even constructively, conferred upon the executive, in any of the above recited Acts, these powers of legislation which belonged exclusively to it, to the extent of such delegation it was an unconstitutional act, and, therefore, inoperative. Clearly the powers exercised by the President in constructing, and therefore in operating, the canal were statutory rather than constitutional. This being true these powers which are purely political, and which are derived from the Constitution, as a

rule, will be eliminated from this consideration. The Courts are practically unanimous in holding that a Court of Equity cannot restrain an executive from exercising that authority which is derived from the organic law, neither can they compel him to act if he refuse. The status of the President, and the nature of the authority delegated to him, and under which he has acted, must be determined from contemporaneous construction and from the language of the Acts themselves. The power to treat with an independent government for the territory embraced in the Zone, and to contract for the building of a canal thereacross, was not a Constitutional power possessed by the President. Congress had the power to create any individual its attorney in fact. In conferring that power upon the President, however, there has been created a perplexity of status that does not seem to have hitherto arisen. Was it the intention of Congress that the President should act in his individual or in his executive capacity in the exercise of these powers which it conferred? Upon a determination of this question the jurisdiction of the Court may, in part, depend.

In determining its jurisdiction the Court may give consideration to what it regards as the three most important features involved. Briefly stated they are:

34 1. Do the acts of Congress prescribe the performance of mere ministerial duties by the President, or do they confer upon him powers involving his individual judgment and discretion?

2. Have the complainants acquired such legal rights in the subject matter involved that they may maintain an action in equity to restrain any interference therewith?

3. Is this an action against the President of the United States? If so, has this Court jurisdiction to command or restrain him?

These propositions will be considered in the order stated.

The first proposition involves a consideration of those acts which are purely ministerial and those involving the exercise of judgment and discretion. What are ministerial and what are judicial acts have been variously defined. The most important criterion, perhaps, is that the duty is one which has been positively imposed by law, and its performance required at a time and in a manner or upon conditions, which are specifically designated, the duty to perform under the conditions specified not being dependent upon the officer's judgment or discretion."—Mechem, Pub. Offi., Sec. 657. "A ministerial duty, the performance of which may, in proper cases, be required of the head of a department by judicial process, is one in respect to which nothing is left to judicial discretion. It is a simply definite duty arising under conditions admitted or proved to exist, and imposed by law"—Mississippi v. Johnson, 4 Wall. 475. "Where the law describes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment, the act is ministerial."—Gen. Land Office v. Smith, 5 Texas 471. "Discretion in the manner of the performance of an act arises when an act may be performed in one or two or more ways either of which would be lawful, and where it is left to the will or judgment of the performer to determine in which way it shall be performed. But, when a positive duty is enjoined, and there is but one way in which it can be performed lawfully, then there is no discretion."—State v. Brooks, 6 L. R.

A. (N. S.) 762. "A ministerial duty is one in respect to which nothing is left to discretion."—Sullivan v. Shanklin, 63 Cal. 247, 251. Numerous definitions might be cited, but they would all be to the same import. From these and such additional definitions as might be quoted, a few simple propositions may be stated, concerning which there can be no argument; (a) A mandatory writ will lie to compel the performance of an act which the law specifically enjoins; (b) unless the act so enjoined by law be ministerial the writ will not lie; (c) a writ will not lie to compel or prevent the performance of a judicial or discretional act; (d) where an act is specifically enjoined by law, but the manner of performing it is discretionary, or involves judicial action, a writ will lie to compel performance, but will not lie to compel performance in a particular manner.

Following these definitions and the rules deduced therefrom it becomes important to determine whether the acts of Congress conferred upon the President mere mininsterial duties, or whether they conferred upon him duties involving the exercise of judgment and discretion. If the former, as an individual, separated from the office of executive, has he failed to perform those duties, or is he about to perform them in an illegal way? If so, the question of injunction sought by the complainants may be considered; if not, they are with out the jurisdiction of a Court of equity. For a determination of the character of these duties thus imposed, we may look not alone to the language of the acts, but to the interpretation placed thereon by the President, and the acquiescense in that interpretation by Congress. It will be seen from the excerpts above made that the several acts contain such expressions as "all rules and regulation necessary for the government of the Canal Zone ... shall be exercised in such manner as the President shall

direct",—Sec. 2, Act of April 28, 1904; "when in the judgment of the President the construction of the Canal shall be sufficiently advanced ..... the President is authorized thereafter to complete, govern, and operate ....."—Act of August 24, 1912. Throughout, the several acts of Congress abound with similar expressions. Words lose their import and interpretation becomes a whim of the fancy if this language could be so construed it would imply the imposition of a duty to do a certain thing in a certain way, without recourse to either judgment or discretion. Nor has it been so construed by any of the Presidents. In a letter addressed to William H. Taft, then Secretary of War, dated May 9, 1904, President Roosevelt interpreted the Act of Congress as authorizing him to " excavate, construct, and complete a ship canal from the Caribbean Sea to the Pacific Ocean", and "to make all needful rules and regulations for the government of the canal zone, and all the rights, powers and authority granted by the Canal Convention to the United States, until the close of the Fifty-eighth Congress". Each of the four Presidents have in
36 turn adopted the phrase "By virtue of the authority vested in me by law" as a prefactory introduction to each order issued by him, thus clearly indicating an interpretative version in harmony with an unlimited discretion . If, then, Congress did confer upon the President the doing of a thing that involved personal judgment and discretion can a Court of equity interpose? Among the authorities there is little or no conflict. Only a few of the leading cases may be noticed.

In Decatur v. Paulding, 14 Pet. 497, it was held that, in general, the official duties of the head of one of the executive departments, whether imposed by act of Congress or by resolution, are not mere ministerial duties. The head of an executive department of the Government

in the administration of the various and important concerns of his office is continually required to exercise judgment and discretion. He must exercise his judgment in expounding the laws and resolutions of Congress under which he is from time to time required to act. That the decision of the questions presented to the Secretary of the Interior was no merely formal or ministerial act is shown beyond the necessity of argument by a perusal of the foregoing statement of the issues presented by this record for the decision of the Secretary. Whether he decided right or wrong, is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the Courts have no power whatever under those circumstances to review his determination by mandamus or injunction. The Court has no general supervisory power over the officers of the Land Department, by which to control their decisions upon questions within their jurisdiction. If this writ were granted we would require the Secretary of the Interior to repudiate and disaffirm a decision which he regarded it his duty to make in the exercise of that judgment which is reposed in him by law, and we should require him to come to a determination upon the issues involved directly opposite to that which he had reached, and which the law conferred upon him the jurisdiction to make. Mandamus has never been regarded as the proper writ to control the judgment and discretion of an officer as to the decision of a matter which the law gave him the power and imposed upon him the duty to decide for himself. The writ never can be used as a substitute for a writ of error. Nor does the fact that no writ of error will lie in such a case as this, by which to review the judgment of the Secretary, furnish any
37 foundation for the claim that mandamus may therefore be awarded. The responsibility as

well as the power rests with the Secretary. Uncontrolled by the Courts.

In the case of People etc., v. Sutherland, 18 Am. Rep. 90, Judge Cooley has discussed this subject in a way that leaves no room for doubt. Only a few extracts therefro mwill be necessary to indicate its application to the present hearing:

"Our government is one whose powers have been carefully apportioned between three distinct departments, which emanate alike from the people, have their powers alike limited and defined by the constitution, are of equal dignity, and, within their respective spheres of action, equally independent. One makes the laws, another applies the laws in contested cases, while the third must see that the laws are executd. This division is accepted as a necessity in all free government, and the very apportionment of power to one department is understood to be a prohibition of its exercise by either of the others. The executive is forbidden to exercise judicial power by the same implication which forbids the Courts to take upon themselves his duties."

Another case in point is that of Louisiana v. McAdoo, 234 U. S. 629:

"There is a class of cases which hold that if a public officer be required by law to do a particular thing, not involving the exercise of either judgment or discretion, he may be required to do that thing upon application of one having a distinct legal interest in the doing of the act. Such an act would be ministerial only. But if the matter in respect to which the action of the official is sought is one in which the exercise of either judgment or discretion is required, the Courts will refuse to substitute their judgment or discretion for that

of the official intrusted by law with its execution. Interference in such a case would be to interfere with the ordinary functions of government. Marbury v. Madison, 1 Cranch, 137, 2 L. ed. 60; Randall v. U. S., 12 Pet. 524, 610, 9 L. ed. 1181, 1215; U. S. v. Schurz, 102 U. S. 378, 26 L. ed. 167, are examples of instances where the duty was supposed to be ministerial. Cases upon the other side of the line are Decatur v. Paulding, 14 Pet. 497, 514, et seq., 10 L. ed. 559, 567; Mississippi v. Johnson, 4 Wall. 475, 18 L. ed. 437; Cunningham v. Macon & B. R. Co., 109 U. S. 446, 27 L. ed. 992, 3 Sup Ct. Rep. 292, 609; U. S. ex. rel. Dunlap v. Black, 128 U. S. 40, 32 L. ed. 354, 9 Sup. Ct. Rep. 12; U. S. ex rel. International Contracting Co.. v. Lamont, 155 U. S. 303, 39 L. ed. 160; 15 Sup. Ct. Rep. 97; Roberts v. U. S., 176 U. S. 221, 41 L. ed. 443, 20 Sup. Ct. Rep. 376; U. S. ex rel. Riverside Oil Co. v. Hitchcock, 190 U S. 316; 47 L. ed. 1074, 23 Sup. Ct. Rep. 698; U. S. ex rel. Ness v. Fisher, 223 U. S. 683, 56 L. ed. 610, 32 Sup. Ct. Rep. 356."

Likewise the case of Decatur v. Paulding, 14 Pet. 497, involving the interpretation of a resolution of Congress:

"The duty required by the resolution was to be performed by him as the head of one of the executive departments of the government, in the ordinary discharge of his official duties. In general, such duties, whether imposed by act of Congress or by resolution, are not mere ministerial duties. The head of an executive department of the government, in the administration of the various and important concerns of his office, is continually required to exercise judgment and discretion. He must exercise his judgment in expounding the laws and resolutions of congress, under which he is from

time to time required to act ..... If a suit should come before this Court, which involved the construction of any of these laws, the Court certainly would not be bound to adopt the construction given by the head of a department. And if they supposed his decision to be wrong, they would, of course, so pronounce their
38 judgment. But their judgment upon the construction of a law must be given in a case in which they have jurisdiction, and in which it is their duty to interpret the act of congress, in order to ascertain the rights of the parties in the cause before them. The Court could not entertain an appeal from the decision of one of the secretaries, nor revise his judgment in any case where the law authorized him to exercise discretion or judgment. Nor can it by mandamus, act directly upon the officer, and guide and control his judgment or discretion in the matter committed to his care, in the ordinary discharge of his official duties. ..... The interference of the Courts with the performance of the ordinary duties of the executive department of the government, would be productive of nothing but mischief; and we are quite satisfied that such a power was never intended to be given to them."

Authorities to the same effect could be multiplied to an unlimited extent, but without here making further recital it may be said that only in those instances where a plain ministerial duty has been prescribed may its performance be enforced, or action under it enjoined by a Court of equity, unless the act creating the duty itself be unconstitutional, a phase of the subject that will be hereafter noticed. It is manifest, therefore, that unless there exist some violation of the authority conferred neither this nor any other Court would have jurisdiction to grant the relief sought.

There is no rule of law beter established than that which requires the complainant in an action seeking injunctive relief to have a property interest in the subject matter of the action. It is alleged by the complainants that as an inducement to them to enter into the services of The Panama Canal and its accessories there was held out to them by the President, the Isthmian Canal Commission, and the Governor of the Canal Zone the inducement that they would be furnished free quarters, free lights, free water, and sundry other privileges in addition to the emoluments which they would receive for their services; that these inducements were a part of the consideration which they were to be paid and but therefor they would not have entered into the employment thereof, and that by virtue of the contractual relations thus established between them and the United States they have acquired a property right in the use and occupation of the quarters which they occupy and to which they were assigned that cannot now be taken from them, except through the impairment of an existing contract. In this connection it will be necessary to notice such documentary history as the Court has been able to discover bearing upon the question of free rentals and other privileges incident thereto.

Act No. 8 of the Executive Branch of the Canal Zone Government, bearing date September 2, 1904, contains this provision:

39 'By authority of the President of the United States, be it enacted by the Isthmian Canal Commission: * * *

Sec. 53. The employes in the service of the Government of the Canal Zone stationed on the Isthmus whose salaries are $1,000.00 or more per year shall be entitled to quarters, or in lieu thereof in each case to a sum

equal to 8 per cent. of the annual salary, at the option of the Commission." * *

So far as the Court is advised this is the first reference made to the subject of free rentals. On the 2nd day of February, 1914, Executive Order No. 1888 was issued by President Wilson, and that order contains this provision:

"By virtue of the authority vested in me by law, it is hereby ordered that the general conditions of employment governing employees on the Isthmus of Panama, necessary for the completion, care, management, maintenance, sanitation, government and operation of the Panama Canal, the Canal Zone, the Panama Railroad, and other adjuncts, shall be as follows:

17. Where practicable, such bachelor quarters on the Isthmus as may be available from time to time will be assigned all employees desiring them. Family quarters, when available, will be assigned under such rules as may be prescribed by the Governor. A charge will be made for rent, fuel, and electric current at such time, and in accordance with such regulations as the President may hereafter establish."

On the 15th day of January, 1915, President Wilson issued Executive Order No. 2120, which order contains this provision:

"By virtue of the authority vested in me it is hereby ordered:

8. The free use of quarters, free fuel and free electric current are not, under the conditions of employment now governing, a vested or contract right of em-

ployes, but revocable privileges, which is has been considered advisable to continue until the permanent force was organized. The revocation of these privileges shall not be made the basis for increasing salaries or wages or otherwise increasing compensation."

On the 25th day of May, 1915, Executive Order No. 2204, was published by the President:

"By virtue of the authority vested in me, it is hereby ordered that the Executive Order of January 15th, 1915, relative to charges for rent, fuel and electric current furnished employes of the Panama Canal and the Panama Railroad Company on the Isthmus of Panama, is modified by suspending from the operation thereof so much as relates to rent, fuel, and lights during the period of actual construction of the Panama Canal, but not later than June 30, 1916."

These several orders, read in connection with the allegations of the petition asserting a property right in the privielge of free rentals, free fuel, and free lights, leave a gap that has not been filled. In view of the fact that the President, as far back as February 2, 1914, announced that a charge would be made covering these privileges hitherto allowed in accordance with such regulations as the President might thereafter establish; and in view of the further fact that the President on the 15th day of January 1915 did issue an order withdrawing these privileges and in so doing explicitly stated they were not "vested or contract rights of employes but revocable privileges": and in view of the yet further fact that on May 25, 1915, the President in restoring these privileges expressly stated that they would be continued only during the period of actual contruction, and in no event

later than June 30, 1916, upon what act of any one of the Presidents is based the allegation of a contractual relationship with respect to these privileges? For a period of almost eight years there has been an outstanding notice from the President that there existed the right to withdraw these privileges, and that no vested or contract rights had been or could be acquired therein. In view of these facts how did, or how could the employes of the United States acquire a vested or property right of any kind in these privileges? On the contrary did they not accept employment with notice that they could not acquire such privileges? It is urged that the act of the Isthmian Commission, bearing date of September 2, 1904, Sec. 53, above quoted, conferred the privilege in the first instance, and the rights now asserted were acquired by virtue of that act. Is this position tenable? The order of President Roosevelt calling the Isthmian Canal Commission into being expressly provides that every act passed by that Commission shall be preceded by the caption "By authority of the President of the United States", it being the purpose and intention of the President not to grant to this or any other auxiliary, power over which he might not exercise supervision. Manifestly, then, the acts of the Commission, from the outset, were the acts of the President, and when the Commission ceased to exist the President was left in the same position as if there had never been a Commission. That it was the intention of Congress to hold the Commission in subservience to the President is clearly indicated by the language of the act creating it, which provides that "said Commission shall in all matters be subject to the direction and control of the President." It is contended, however, that the Panama Canal Act, Sec. 2, heretofore quoted, ratifies the act of the Commission in establishing free rentals, and that the President is powerless to revoke

that privilege without authority from Congress. The language of the act is "That all laws, orders, regulations, and ordinances adopted and promulgated in the Canal Zone by order of the President for the government and sanitation of the Canal Zone and the construction of the Panama Canal are hereby ratified and confirmed as valid and binding until Congress shall otherwise provide." It will be observed this ratification
41 is limited to such rules, regulations, etc., as had been promulgated for the "government, sanitation and construction" of the Panama Canal. Did this include the privilege of free quarters? If so, it included also every rule and regulation promulgated and established by either the Commission or the President during the construction period. If the privilege or rent was included the established scale of wages and many other similar rules then existing were also included. If it were a question vital to this issue it might be urged with force and reason that many of the acts of the Canal Commission were clearly unconstitutional. That Congress could not delegate to a commission appointed by the President the right to legislate with reference to the life, liberty and property of citizens of the United States in matters where Congress alone could act, will hardly be questioned, and when the Canal Commission undertook, even with the sanction and authority of the President, to establish a code of laws that involved the life and property of the citizen, it went beyond its jurisdiction, and to cure this evident exercise of a power it did not possess and that could not be delegated to it, Congress found it necessary to ratify the laws the Commission had established until such time as Congress might otherwise decree. But certainly Congress did not intend to give statutory sanction to every rule and regulation established by the Commission and the President during

the construction period of the Canal, and to hold such rules and regulations binding after construction. The sanitation regulations, port regulations, tariff schedules, transportation rates have been made the subject of constant change. This could not have been done if every rule and regulation prior to 1912 received the statutory sanction of Congress in the ratification clause of the Panama Canal Act, and were now binding. It cannot be said that the ratification act applies to one rule or regulation and does not apply with equal force to all the others. The Attorney General on June 19, 1916, in construing the term "compensation" with relation to the privileges enjoyed by the employes of the Canal impliedly concurred with the conclusions reached by the President in the Executive Order of January 15, 1915, in holding that rental and other privileges were revocable at the will of the President. Since, then, the power to enact carries with it the power to repeal has the President exceeded his authority in withdrawing a privilege declared by his predecessor to be revocable? Has not Congress by its silence acquiesced in the acts of a former President, and in the construction placed by him on his powers of revocation?

42 In this connection the opinion of Attorney General Bonaparte, dated January 30, 1907, 26 Op. 119, may be considered as bearing upon the conclusions reached by President Wilson. Some doubt had arisen in the mind of the Secretary of War with reference to the rights of the President upon failure of the Fifty-eighth Congress to enact additional legislation for the government and control of the Canal Zone. In response to an inquiry from the Secretary of War the Attorney General said: "In my opinion the President may now, directly or through the persons appointed and employed by him to govern the Zone and build the Canal, adopt needed rules and regulations for

the government of the Canal Zone, and that he has not lost the power to modify any of the rules and regulations established by the Canal Commission prior to the expiration of the Fifty-eighth Congress." And again in this same communication the Attorney General says: "There is nothing in this act, approved April 28, 1904, or in any other act of Congress relating to this subject-matter, which discloses any purpose on the part of Congress to give to determinations of the Isthmian Canal Commission a peculiar permanency, or to exempt them from modification or rescision in the discretion of the President." That the act of 1912 did not take from the President the power to rescind existing privileges concerning rents has clearly been the opinion of the several Presidents since the passage of that act. If President Wilson had thought he possessed no power of regulation or rescision, it is not conceivable that he would have said in the order of May 25, 1915, rescinding the order directing the collection of rents, that the rescision should in no event be operative beyond June 30, 1916. Reverting to the fact that to assume that it was the purpose and intention of Congress in the act of 1912 to withdraw from the President any control over the subject of rentals, and other privileges, is to assume that it was equally the purpose and intention of Congress to withdraw from the President control over any of the exiting laws and regulations of the Isthmian Canal Commission at the time of the passage of the act in question. Clearly Congress had no such intention, nor has any of the Presidents ever attributed any such intention to Congress. If, then, Congress did not withdraw the power of revision from the President the order of President Harding is otherwise legal, and the complainants have not now and have never had an irrevocable interest in these privileges.

That they have no right of action, if this be

43 true, will not be disputed. Rose, in his notes on the case Marbury v. Madison, concludes, after a review of the cases, that two things must concur: "First, a clear, legal right to have the thing done, to compel the doing of the thing for which the writ is sought; and, second that there is no other adequate legal remedy by which the specific performance of the duty can be enforced." High on Extraordinary Legal Remedies, Sec. 431, lends added strength to the rule. A collection of the leading authorities in support of this proposition will be found in the text of the above authors as indicated.

The Court having advanced thus far in its considerations and conclusions only a brief discussion of the third proposition will be necessary. This is an action against the Governor, the Auditor and the Paymaster of the Canal Zone. The Governor is an appointee of the President, and the other two are appointees of the Governor. The act complained of is based on an order is- of the Canal Zone. The defendants are merely the agents of the President for the enforcement of his orders. They have no interest personal to themselves in the controversy, except as they may incidentally be subject to the operation of the order itself. "When the head of a department acts as a mere assistant or agent of the executive in the performance of a political or discretionary act, he is no more subject to the control of the Courts than the chief executive himself."—People v. Governor, 18 Am. Rep. 95. As heretofore expressed, the powers asserted by the President are derived from an act of Congress and not from the Constitution. The delegation of power is to the office of President and not to the individual. It is to be assumed that Congress acted under the assumption that one selected by the people to hold the highest office created by the Con-

stitution would be competent to discharge the duties imposed in its acts with reference to the construction and operation of the Canal. Whether Congress considered the effect of a delegation of power to the office rather than the individual may be doubted, but that there is a marked difference may not be doubted. The significance of such a discrimination is clearly set forth by Judge Cooley in the last mentioned case, when he says:

44 "The apportionment of power, authority and duty to the governor, is either made by the people in the constitution, or by the legislature in making laws under it; and the Courts, when the apportionment has been made, would be presumptuous if they should assume to declare that a particular duty assigned to the governor is not essentially executive, but is of such inferior grade and importance as properly to pertain to some inferior office, and consequently, for the purpose of this jurisdiction, the Courts may treat it precisely as if an inferior officer has been required to perform it. To do this would not only be to question the wisdom of the constitution or the law, but also to assert a right to make the governor the passive instrument of the judiciary in executing its mandates within the sphere of his own duties. Were the Courts to go so far, they would break away from those checks and balances of government which were meant to be checks of co-operation, and not of antagonism or mastery, and would concentrate in their own hands something at least of the power which the people, either directly or by the action of their representatives, decided to intrust to the other departments of the government."

Another case bearing upon this phase of the subject is that of Wilson v. Louisiana Purchase Commision, 133 Iowa 568. In this action the plaintiff claimed that there

was due him the sum of $200.00 under a contract with this Commission. This commission was formed by an act of the legislature. Among the duties delegated to it was the auditing and passing upon the validity of claims presented for payment, which claims, when allowed, were to be paid by the state. Plaintiff alleged the performance of certain services, and the refusal of the commission to allow his claim. Among other defenses it was claimed this was in effect an action against the state, the commission being its delegated agent. In discussing the subject the Court said:

"The Louisiana Purchase Exposition Commission was a creature of the state, created for the specific purpose of representing the state and its interests at the exposition bearing its name. All expenses incurred by it in the execution of its delegated powers were payable from the funds of the state set apart by legislative authority for that express purpose. The commission was clearly but an agent of the state through whom the public funds were to be disbursed, and this disbursement was authorized by law only upon the exercise of the discretion and judgment of the commission. While the state is not named as a party in the action, it is quite clear to us that it is in fact the actual party in interest. If the writ prayed for were to be issued, it would compel the defendant to make a draft upon state funds; in other words, the effect thereof would be to compel the state itself to pay the plaintiff's claim, which is an unliquidated demand for which no specific provision has been made from state funds. It is fundamental that a state cannot be sued in its own Courts without its consent, and it is a further rule that a litigant will not be permitted to evade the general rule by bringing action against the servants or agents of the state to enforce satisfaction for claims."

In the recent case of Louisiana v. William Gibbs McAdoo, Secretary of the Treasury of the United States, 234 U. S. 629, there is a strong reaffirmation of this same doctrine:

"That the United States is not named on the record as a party is true. But the question whether it is in legal effect a party to the controversy is not
45 always determined by the fact that it is not named as a party on the record, but by the effect of the judgment or decree which can here be rendered."—Minnesota v. Hitchcock, 185 U. S. 373, 387, 46 L. ed. 954, 962, 22 Sup. Ct. Rep. 650; Kansas v. United States, 204, U. S. 331, 333, 51 L. ed. 510, 27 Sup. Ct. Rep. 388.

Under the allegations of the petition the immunity claimed by the plaintiffs grows out of an implied contract on the part of the United States, made through the President, with the employes of the government of the Canal Zone. Without authority, it is claimed, the President has issued an order which impairs the rights acquired under that implied contract. If this Court adheres to the rulings announced in the foregoing cases, it must conclude that this is an action against the President of the United States, or the United States, or both. The defendants named are only nominal parties, and not the real parties in interest. Reverting again to the McAdoo case we find the law this clearly stated by Judge Lurton:

"No principle is better established than that the United States may not be sued in the Courts of this country without its consent. If, therefore, this be a suit against the United States, the state, though entitled

as a state to appeal to the original jurisdiction of this Court, must show some authority from Congress under which such a suit may be brought, or leave to file must be denied.—U. S. v. Clarke, 8 Pet. 436, 8 L. ed. 1001; U. S. v. Lee, 106 U S. 196, 27 L. ed. 171, 1 Sup. Ct. Rep. 240; Kansas v. U. S., 204 U. S. 331, 333, 51 L. ed. 510, 27 Sup. Ct. Rep. 388."

This case follows the earlier case of Beers v. Arkansas, 20 How. 993, 15 L. ed:

"It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own Courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege and permit itself to be made a defendant in a suit by individuals, or by another state. And as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it."

A multiplication of authorities upon this subject is not regarded as essential. Something may be said in answer to the argument of counsel for complainants, and some notice may be taken of a few of the authorities upon which reliance is placed. It is claimed that the President is acting in excess of authority, and therefore an action will lie to restrain him from so doing, the fact that he is President being immaterial. Under the conclusions reached by the Court this would be true if he were acting under an unconstitutional statute. The case of Hoover v. McChesney has been urged with

confidence by counsel in support of his conten-
46 tion. An examination of the Hoover case will disclose the fact that the Postmaster General had refused the mails of the United States to an institution which he had decided, under the authority of an Act of Congress, was engaged in an unlawful business. On the hearing it was decided by Judge Barr, of the Kentucky District, that the Act of Congress which conferred the right of seizure on the Postmaster General was unconstitutional, and that, therefore, an injunction would lie to restrain him from withholding complainant's mail, or a mandamus to compel him to deliver it.

Another case urged with great force is that of Smith v. Jackson, 241 Fed. 769. In this case the auditor of the Canal Zone, a ministerial officer, withheld from the district judge what he conceived to be a reasonable sum for rent, and such additional sum as would represent the proportionate part of his salary for such period as he was absent from the Canal Zone in excess of the time allowed by the act creating his office. The Court held that inasmuch as an annual salary had been fixed by Congress, and an appropriation had been made for a sum sufficient to pay it; and that inasmuch, further, as there was at the time no order requiring employes to pay rent, that the auditor had no discretion but to pay the salary fixed by law. In its essential features it has no bearing upon the present case.

The argument of counsel that the District Courts of the United States have concurrent jurisdiction with the Court of Claims in this character of suits under the act of 1887 is not available in this action, for the reason that the complaint contains none of the allegations of fact required by that act, and for the further reason that process has not been had as that act requires, that the United States is not made a party, but more especially because there is a subsequent act of Congress

which probably excepts this class of cases from the operation of that law.

A careful examination of the whole case has convinced the Court that Congress not only conferred, but intended to confer, upon the President an unrestricted power of supervision, involving judgment, decision and discrimination, with respect to the entire canal project, and that the Courts can exercise no direction thereover; that the complainants do not possess and never acquired a property interest in the privilegegs which they have hitherto received, and which are the subject of this proceeding, that will sustain the Court in granting the relief sought, it being the opinion of the Court that these privileges and benefits are revocable at the will of the President; and, lastly, it being alleged that these privileges result to them through a contractual
47 relation which exists between them and the United States, through the President, either the President, or the United States, or both, are the real parties in interest, and that being true this Court has no jurisdiction to determine the rights of the parties.

The opinion here submitted has taken a somewhat wider range than the motion filed by the respondents might warrant or require. The scope of the argument indulged by counsel, it may be urged in extenuation, has invited a rather full consideration of the whole case. And, in response to some of the arguments adduced the Court may be pardoned if it indulges the suggestion that Courts stray afield of their province if they discuss the wisdom or the policy of a law. Arguments bearing upon this feature of a statute address themselves to the lawmaking rather than the law-enforcing branch of government. A Court that yields to inclination ceases to be a Court. A law may be burdensome, it may

be unpopular, it may offend public sentiment, but if it be valid the Courts are powerless to grant relief against its operation. In this, as in all similar situations, the relief desired should be sought at the source of the stream.

In dismissing the present action the Court is not unmindful of the rule that Courts should assume rather than decline jurisdiction, for the reason that every citizen who feels aggrieved should have a Court in which his cause may be heard, but at the same time there is an equally potent rule which impresses upon the Courts the necessity for following established precedents, for otherwise there would be no settled rule or procedure in any given case, and order, in the end, would be forced to yield to confusion.

Let the motion to dismiss be sustained.

(Sgd.) CHARLES KERR,
United States District Judge.

Ancon, Canal Zone, January 5, 1922.

Filed Jan. 5, 1922. in the office of the Clerk of the District Court, Canal Zone. (Sgd.) E. M. Goolsby, Clerk.

48 FINAL DECREE DISMISSING PLAINTIFF'S SUIT.

United States of America, Canal Zone.

In the United States District Court for the Canal Zone, The Division of Balboa.

Harvey McConaughey,
Plaintiff,

vs. No. 540, Civil.

J. J. Morrow, Governor of the Panama Canal, et als.,
Defendant.

And now the Court having filed its opinion and made its order herein, sustaining Defendants' Motion to Dismiss, it is therefore,

Ordered, adjudged and decreed,

That this cause be and the same is hereby dismissed, without costs.

Given in open Court, at Ancon, C. Z., this 5th day of January, 1922.

(Sgd.) CHARLES KERR,
United States District Judge.

Filed Jan. 5, 1922, in the office of the Clerk of the District Court, Canal Zone. (Sgd.) E. M. Goolsby, Clerk.

49 BILL OF EXCEPTIONS.

United States of America, Canal Zone.

In the United States District Court for the Canal Zone, Division of Balboa.

Harvey McConaughey,

Plaintiff,

vs. No. 340, Civil.

J. J. Morrow, Governor of the Panama Canal, et als., Defendants.

Be it remembered, that this cause coming on to be heard upon the verified Complaint of the Plaintiff, and the Motion to Dismiss, filed on behalf of the Defendants, in our District Court, on date of December 28, 1921, and argument of counsel thereon being heard, and the Court having taken the matter under advisement, and thereafter, to-wit, upon the 5th day of January, 1921, the Court having filed its opinion and announced its decision sustaining the said motion to dismiss, Plaintiff, by Mr. Wm. C. MacIntyre, his attorney, announced that he objected to said decision and ruling and prayed that he be allowed to note and reserve his exceptions thereto upon the following grounds:

1. That the granting of said motion deprives the plaintiff of due process of law guaranteed unto him by the Constitution of the United States and the laws of the Canal Zone.

2. That the granting of said motion allows defendants to deprive plaintiff of his property without due process of law.

3. That the granting of said motion is and works a denial of justice unto the Plaintiff, and is a denial of his day in Court.

4. That the granting of said motion is contrary to law as expressed in the decision of the Circuit Court of Appeals in the case of Smith v. Jackson, 241 Fed., 757, affirmed by the U. S. Supreme Court in 246 U. S. 388.

5. That the granting of said motion allows defendants to unlawfully withhold from plaintiff, and from those in whose behalf he sues, the sum of about $50,000.00 per month, beginning with January 1st, 1922, which money has been earned by plaintiff and his co-plaintiffs as salary, fixed by authority of Congress for services performed for the United States, and which money has been appropriated by Congress for the payment of said salaries, and is now available unto defendants for such purpose and for such purposes only.

50 6. That the granting of said motion allows defendants to raise revenue for the United States, in violation of the provisions of the Constitution of the United States, and otherwise than by a bill originating in the House of Representatievs.

7. That the granting of said motion allows defendants to unlawfully divert government property from the purpose for which it was constructed and paid for by public funds of the United States.

8. That the granting of said motion allows defendants to impose upon and collect from plaintiff, and his co-plaintiffs, a direct tax, not uniform throughout the States of the Union, for the purpose of providing funds for public works of the United States.

9. That the granting of said motion allows defendants to make effective and enforce certain order of the president, made in excess of his authority, and without any authority of law, and contrary to Executive Orders made by his predecessor in office, and contrary to the provisions of an Act of Congress known as the Panama Canal Act, to the great and irreparable injury of plaintiff and of those in whose behalf he sues.

Whereupon the Court allowed unto plaintiff all of the said exceptions.

And thereafter, on the said 5th day of January, 1922, the Court entered herein its final order, decree and judgment, dismissing the bill of complaint of plaintiff and giving judgment for the defendant herein.

Whereupon, plaintiff, by his said attorney, stated that he objected to the entry of said order, decree and final judgment, and prayed that he be allowed to note and reserve thereto the same exceptions as already reserved to the ruling upon the motion to dismiss; and said exception were duly allowed by the Court.

And as all of said matters and things do not appear fully of record herein, plaintiff respectfuly tenders to the Court this bill of exceptions, and prays that the same may be approved and allowed by the Court and made a part of the Record in this cause.

(Sgd.) WM. C. MacINTYRE,
Attorney for plaintiff.

The foregoing bill of exceptions is hereby approved, and ordered filed and made a part of the record herein, the parties hereto, by their respective attorneys, agreeing.

Ancon, C. Z., Jan. 5, 1922.

(Sgd.) CHARLES KERR,
U. S. District Judge.

51 (Indorsement): Filed Jan. 5, 1922, in the office of the Clerk of the District Court, Canal Zone. (Sgd.) E. M. Goolsby, Clerk.

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52 PETITION FOR APPEAL.

United States of America, Canal Zone.

In the United States District Court for the Canal Zone, Balboa Division.

Harvey McConaughey,
Plaintiff,
vs. No. 540 Civil.

J. J. Morrow, Governor of the Panama Canal, et als., Defendants.

To the Honorable Charles Kerr, United States District Judge for the Canal Zone:

The petition of Harvey McConaughey, plaintiff herein, made for himself and in behalf of all of those in whose behalf he brought his suit, as is set forth in his complaint, respectfully showeth unto Your Honor:

That on the 24th day of December, 1921, plaintiff filed his bill of complaint herein, for the causes in said bill of complaint set forth and verified, and thereafter

process, in form of an order to show cause, issued to said defendants, and thereafter, to-wit, on the 28th day of December, 1921, defendant filed herein their motion to dismiss, which motion was made and heard by Your Honor upon the grounds in said motion set forth and expressed. And thereafter, to-wit, on the 5th day of January, 1922, over the objection of plaintiff, Your Honor made and entered an order sustaining and granting defendants' said motion, to which said order your Honor allowed plaintiff to note and reserve his exceptions, which was duly done. And thereafter Your Honor made and caused to be entered final judgment herein, dismissing plaintiff's said bill of complaint; to which said judgment plaintiff likewise noted and reserved his exceptions by Your Honor's allowance.

Your Petitioner believes that the said orders and judgment of the Court were erroneous, and that injustice would be done if the same should be allowed to stand and be carried into effect.

Wherefore your petitioner respectfully prays for leave to appeal from said orders and judgment unto the United States Circuit Court of Appeals for the Fifth Circuit.

WM. C. MacINTYRE,
Attorney for plaintiff.

Filed Jan. 5, 1922, in the office of the Clerk of the District Court, Canal Zone. (Sgd.) E. M. Goolsby, Clerk.

53 AFFIDAVIT ON APPEAL.

United States of America,
Canal Zone, SS.
Ancon.

William C. MacIntyre, of lawful age, being first duly sworn, acocrding to law, on oath deposes and says:

That he is the Attorney for the Plaintiff herein; that the appeal from the final order and decree of the United States District Court for the Canal Zone in the above-entitled cause, was not taken for delay, but because the deponent believes that injustice would be done by the said final judgment or decree if carried into effect and allowed to become final, and deponent further says that the amount herein involved is in excess of $1000,00, exclusive of interest and costs.

WM. C. MacINTYRE,
Attorney for Plaintiff.

Subscribed and sworn to before me at Ancon, C. Z., this 5th day of January, 1922.

(Sgd.) E. M. GOOLSBY,
(Seal of Court) Clerk of the Court.

Filed Jan. 5, 1922, in the office of the Clerk of the District Court, Canal Zone. (Sgd.) E. M. Goolsby, Clerk.

54 ASSIGNMENTS OF ERROR.

United States of America, Canal Zone.

In the United States District Court for the Canal Zone, Balboa Division.

Harvey McConaughey, etc.,
Plaintiff,
vs. No. 540 Civil.

J. J. Morrow, Governor of the Panama Canal, et als.,
Defendants.

The assignments of error of the plaintiffs herein, against the said defendants, respectfully show unto this Honorable Court as follows:

First Assignment of Error.

That the Court erred in holding that the present suit is, in effect, a suit against the President, or against the United States, and that therefore the Court is without jurisdiction to entertain this suit.

Second Assignment of Error.

That the Court erred in holding that the Court is without jurisdiction over the defendants herein.

Third Asignment of Error.

That the Court erred in holding that plaintiff and his co-plaintiffs have no property interest in the privileges granted by the terms and conditions of their employment.

Fourth Assignment of Error.

That the Court erred in holding that the plaintiff and his co-plaintiffs have no property interest in the salaries and wages earned by them and threatened to be withheld from them by the defendants.

Fifth Assignment of Error.

That the Court erred in holding that employees of the Panama Canal and of the Panama Railroad have no property interest or vested right in the occupancy and use of the quarters which have been assigned to them free of cost during the term of their employment according to regulations of the Isthmian Canal Commission, ratified by the Act of Congress known as the Panama Canal Act of August 24, 1912, and continued by express provision of Executive Order of President Wilson of July 25, 1916.

Sixth Assignment of Error.

That the Court erred in holding and ruling that the regulations adopted by the Isthmian Canal
55 Commission at its 120th meeting, and promulgated by order of the President concerning conditions of employment for the construction of the Panama Canal, were not continued in force as valid and binding by provision of the Panama Canal Act of August 24, 1912.

Seventh Assignment of Error.

That the Court erred in holding and ruling that the President may by executive order subsequent to the enactment of the Panama Canal Act of August 24, 1912

change, annul, repeal, or modify the regulations adopted by the Isthmian Canal Commission and promulgated by order of the President, regulating and fixing the conditions of employment for the construction of the Panama Canal.

Eighth Assignment of Error.

That the Court erred in holding and ruling that: "For a period of almost eight years there has been an outstanding notice from the President that their existed the right to withdraw these privileges, and that no vested or contract rights had been or could be acquired therein," and in failing to find, hold and rule that the Executive Order of January 15, 1915, was expressly rescinded and abrogated by subsequent Executive Order of July 25, 1916, and that by said latter Executive Order all of said privileges were expressly given to employes as a condition of their employment.

Ninth Assignment of Error.

The Court erred in failing to hold and rule that an Executive Order lawfully made by President Wilson creating and establishing contractual rights for the plaintiff and his co-plaintiffs cannot be lawfully revised or abrogated by his successor in office, and that rights thereunder obtained and entered into cannot be taken away without due process of law.

Tenth Assignment of Error.

The Court erred in holding and ruling that the Executive Order of December 3, 1921, was made by the President under authority of the Panama Canal Act of August 24, 1912.

Eleventh Assignment of Error.

The Court erred in holding that the action of the President in making Executive Order of December 3, 1921, providing for charges against plaintiff and his co-plaintiffs for the purpose of raising revenue for public works of the United States is constitutional and made under authority of law.

56 Twelfth Assignment of Error.

The Court erred in holding and ruling that: "Congress not only conferred but intended to confer, upon the President an unrestricted power of supervision, involving judgment, decision and discrimination, with respect to the entire canal project, and that the Courts can exercise no direction thereover."

Thirteenth Assignment of Error.

The Court erred in failing to hold and to rule that the Court has jurisdiction to enjoin the defendants herein from causing a breach of contract made between plaintiff and his co-plaintiffs and the United States.

Fourteenth Assignment of Error.

The Court erred in dismissing plaintiff's complaint upon the grounds and for the reasons set forth in the Opinion of the Court herein filed of record.

(Sgd.) WILLIAM C. MacINTYRE,
Attorney for Plaintiff.

(Indorsement): Filed January 5, 1922 in the office of the Clerk of the District Court, Canal Zone, (Sgd.) E. M. Goolsby, Clerk.

57 ORDER ALLOWING APPEAL.

United States of America, Canal Zone.

In the United States District Court for the Canal Zone, Division of Balboa.

Harvey McConaughey,
Plaintiff,
vs. No. 540 Civil.

J. J. Morrow, Governor of the Panama Canal, et als.,
Defendants.

And now the Plaintiff herein having prayed for leave to appeal from the final judgment herein rendered and entered, unto the United States Circuit Court of Appeals for the Fifth Circuit, and having filed herein his Assignments of Error, and Defendants, by their Attorney, A. C. Hindman, in open Court having waived any further notice of said petition for Appeal, and this Court being willing that error, if any has been made, may be corrected and that justice be done, it is therefore,

Ordered,

That plaintiff may be allowed, and he is hereby allowed his appeal from the final order and decree of this Court in this cause heretofore made, unto the Honorable The United States Circuit Court of Appeals for the Fifth Circuit, sitting at New Orleans, La., U. S. A.

Done in open Court, at Ancon, C. Z., this 5th day of January, 1922.

(Sgd.) CHARLES KERR,
U. S. District Judge.

Filed Jan. 5, 1922, in the office of the Clerk of the District Court, Canal Zone, (Sgd.) E. M. Goolsby, Clerk.

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58 PETITION FOR WRIT OF ERROR.

United States of America, Canal Zone.

In the United States District Court for the Canal Zone, Division of Balboa.

Harvey McConaughey,
Plaintiff,
vs. No. 540 Civil.

J. J. Morrow, Governor of the Panama Canal, et als., etc.,
Defendants.

Comes now the above-named Plaintiff, by William C. MacIntyre, his attorney, for himself, and for all of those in whose behalf he sues, and feeling himself and themselves aggrieved by the judgment of this Court in the above-entitled cause made and entered, whereby judgment was rendered for the Defendants, and against the Plaintiff, dismissing Plaintiff's complaint and action herein, and he hereby moves and petitions this Honorable Court for an order to be made, allowing the said Plaintiff to prosecute a writ of error from the Honorable the United States Circuit Court of Appeals for the Fifth Circuit, to this Honorable Court, for the reasons specified in the Assignment of Errors already filed herein; and that this Petition being allowed, a Transcript of the Record in this cause, and of all the proceedings upon which judgment was rendered, duly authenticated and certified, may be made and sent to

the said United States Circuit Court of Appeals for the Fifth Circuit, at New Orleans, La., U. S. A.

WM. C. MacINTYRE,
Attorney for Plaintiff.

Filed Jan. 5, 1922, in the office of the Clerk of the District Court, Canal Zone, (Sgd.) E. M. Goolsby, Clerk.

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59 ORDER ALLOWING WRIT OF ERROR.

United States of America, Canal Zone.

In the United States District Court for the Canal Zone, Division of Balboa.

Harvey McConaughey,
Plaintiff,
vs. No. 540 Civil.

J. J. Morrow, Governor of the Panama Canal, et als.,
Defendants.

And now upon reading the petition for Writ of Error herein filed by the Plaintiff, and upon motion of Mr. William C. MacIntyre, attorney for Plaintiff, it is

Ordered,

That a Writ of Error be and the same is hereby allowed to issue, to have reviewed by the Honorable the United States Circuit Court of Appeals for the Fifth Circuit, the final judgment herein made and entered; and it is further ordered that the bond upon said writ of error be in the sum of Five Hundred dollars, ($500,00), and said Plaintiff having been also herein allowed an Ap-

peal from said judgment, it is further ordered that said bond shall be and serve for both said Appeal and the said Writ of Error.

Be it further ordered that Citation issue unto the Defendants herein.

(Sgd.) CHARLES KERR,
U. S. District Judge.

Given in open Court, at Ancon, C. Z., this 5th day of January, 1922.

Filed Jan. 5, 1922, in the office of the Clerk of the District Court, Canal Zone, (Sgd.) E. M. Goolsby, Clerk.

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60 CITATION IN ERROR, AND ON APPEAL.

United States of America, Canal Zone.

In the United States District Court for the Canal Zone, Division of Balboa.

Harvey McConaughey,
Plaintiff,
vs. No. 540 Civil.

J. J. Morrow, Governor of the Panama Canal, et als., etc.,
Defendants.

To J. J. Morrow, Governor of the Panam Canal; H. A. A. Smith, Auditor of the Panama Canal, and R. W. Glaw, Paymaster of the Panama Canal, Greeting: You are hereby cited and admonished to be and ap-

pear in the United States Circuit Court of Appeals for the Fifth Circuit, at New Orleans, Louisiana, U. S. A., thirty days from and after the day this citation bears date, pursuant to a Writ of Error and Appeal filed in the Clerk's Office of this Court, wherein Harvey McConaughey is plaintiff in error and appellant, and J. J. Morrow, Governor of the Panama Canal, H. A. A. Smith, Auditor of the Panama Canal, and R. W. Glaw, Paymaster of the Panama Canal, are defendants in error and appellees, to show cause, if any there be, why the judgment rendered against the Plaintiff, in said Writ of Error and appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the hand and seal of the Honorable Charles Kerr, United States District Judge for the Canal Zone, hereunto set this 5th day of January, 1922.

(Sgd.) CHARLES KERR,
U. S. District Judge.

Attest:

(Sgd.) E. M. GOOLSBY,
Clerk of the Court.

Service of this Citation is hereby acknowledged, at Ancon, Canal Zone, this 5th day of January, 1922.

(Sgd.) A. C. HINDMAN,
Attorney for Defendants.

61 (Indorsement): Filed Jan. 5, 1922, in the office of the Clerk of the District Court, Canal Zone. (Sgd.) E. M. Goolsby, Clerk.

62 BOND ON APPEAL AND WRIT OF ERROR.

United States of America, Canal Zone.

In the United States District Court, in and for the Canal Zone, Balboa Division.

Harvey McConaughey,
Plaintiff,
vs. No. 540 Civil.

J. J. Morrow Governor of the Panama Canal, et als., Defendants.

Know all men by these presents, that we, Harvey McConaughey, as principal, and Joseph Wynne, W. C. Hushing, and E. L. Emrey all of Balboa, Canal Zone, as sureties, are and hereby recognize ourselves to be well and firmly unto the defendants here in the penal sum of Five Hundred Dollars ($500.00) for the faithful payment whereof, according to the terms and tenor of this obligation we hereby pledge ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated at Ancon, Canal Zone, this 5th day of January, 1922.

Now the terms and conditions of this obligation are as follows:

Whereas, on the 5th day of the January term of the District Court for the Canal Zone in the present year in a suit pending in said Court between Harvey McConaughey, plaintiff, and J. J. Morrow, Governor of the

Panama Canal, H. A. A. Smith, and R. W. Glaw, Auditor and paymaster, respectively, of the Panama Canal, defendants, a judgment was rendered against the said Harvey McConaughey, and the said Harvey McConaughey has prayed for and obtained an appeal and a writ of error to review said judgment in the United States Circuit Court of Appeals for the Fifth Circuit, at New Orleans, and a citation directed to the said defendants citing and admonishing them to be and appear in the said U. S. Circuit Court of Appeals at New Orleans, La., thirty days from and after the date of said citation (which will be February 4, 1922) which citation has been duly served and acknowledged by attorney for defendants.

Now therefore, if the said Harvey McConaughey shall appear in the said United States Circuit Court of Appeals at the time specified in said citation, and shall prosecute his said appeal to effect, and shall answer all damages and costs that may be awarded
63 against him, if he fail to make his plea good, then, and in such case this obligation shall be wholly discharged and void; otherwise to remain in full force and effect for the payment of all such damages and costs.

(Sgd.) HARVEY McCONAUGHEY,
Principal.
J. WYNNE,
W. C. HUSHING,
E. L. EMREY,
Sureties.

The foregoing bond and the sureties thereupon are hereby approved by the undersigned United States District Judge, and said bond is ordered filed in this cause.

Given in Chambers, at Ancon, Canal Zone, this 6th day of January, A. D. 1922.

(Sgd.) CHARLES KERR,
United States District Judge.

Attest:

(Sgd.) E. M. GOOLSBY,
Clerk of the Court.

Filed January 6, 1922, in the office of the Clerk of the District Court, Canal Zone. (Sgd.) E. M. Goolsby, Clerk.

64 United States of America,
Canal Zone. SS.

I, E. M. GOOLSBY, Clerk of the District Court of the Canal Zone, do hereby certify that the foregoing 63 pages contain a true and correct copy of the proceedings and orders authorizing the prosecution of an appeal and writ of error to the United States Circuit Court of Appeals for the Fifth Circuit in the above styled cause; and I further certify that the foregoing 63 pages contain a true and complete transcript of all the material proceedings had upon the trial of the said cause in the District Court of the Canal Zone up the granting of the appeal and the suing out of the writ of error.

In witnes whereof, I have hereunto set my hand and seal of this Court on this 6th day of January, A. D. 1922.

E. M. GOOLSBY,
(Seal) Clerk of Court.

Order Requiring Appellees to Hold Moneys Collected and Not to Deposit Same in the Treasury of the United States Pending Appeal, etc.

Filed January 31st, 1922.

In the United States Circuit Court of Appeals, Fifth Circuit.

No. 3826.

HARVEY MCCONAUGHEY, for Himself and Others, Appellant and Plaintiff in Error,

versus

J. J. MORROW, Governor of the Panama Canal et al., Appellees and Defendants in Error.

Appeal from and Error to the United States District Court for the Canal Zone.

In the above case, it being represented to the Court that there is danger of irreparable injury occurring to the plaintiffs in error-appellants pending the hearing of said appeal unless a temporary restraining order is granted preventing the payment of the moneys to be collected from said appellants and plaintiffs pending said appeal into the Treasury of the United States;

It is, upon consideration, ordered that the defendants in said case be required to hold said moneys collected pending said appeal, including those now in their hands, and not to pay the same into the Treasury of the United States, that they may continue to collect or withhold said moneys pending the hearing and decision of said case, the purpose of this order being to preserve the status quo.

It is further ordered that the said defendant shall have the right to apply at any time for modification or revocation of this order upon giving such notice to the appellants and plaintiffs in error as may be prescribed by this Court on the application for such hearing.

Jan. 31, 1922.

(Signed) R. W. WALKER,
United States Circuit Judge.

(Signed) N. P. BRYAN,
United States Circuit Judge.

(Signed) ALEX C. KING,
United States Circuit Judge.

Clerk's Office.

Attest:
A True Copy:
(Signed) FRANK H. MORTIMER,
[SEAL.] *Clerk U. S. Circuit Court of Appeals, Fifth Circuit.*

New Orleans, La., January 31st, 1922.

Return of Service.

Served the foregoing order on Colonel Meriwether L. Walker, Acting Governor of The Panama Canal, H. A. A. Smith, Auditor of The Panama Canal, and R. W. Glaw, Paymaster of The Panama Canal, by delivering to each a true copy of same, at Balboa Heights, Canal Zone, February 7th, 1922. (The Marshal's fee amounting to $3.60 has been collected.)

HORACE D. RIDENOUR,
U. S. Marshal for the Canal Zone,
(Signed) By FRANK T. HAMLIN,
Deputy.

Motion of Appellees to Dismiss and Acceptance of Service.

Filed March 8th, 1922.

United States Circuit Court of Appeals, Fifth Circuit.

No. 3826.

HARVEY MCCONAUGHEY, for Himself and in Behalf of All Other Employees of the Panama Canal and the Panama Railroad, on the Isthmus of Panama, Appellant (Plaintiff in Error),

vs.

J. J. MORROW, Governor of the Panama Canal; H. A. A. SMITH, Auditor of the Panama Canal; R. W. Glaw, Paymaster of the Panama Canal, and the Successors in Office of All the said Parties, Appellees (Defendants in Error).

And now come the defendants in error and appellees and move the court to dismiss the writ of error and appeal herein for the following reasons, to-wit:

I.

That it appears from the record in the above-entitled cause that this appeal and writ of error are prosecuted solely from the decision of the District Court of the Canal Zone denying jurisdiction in the above-entitled cause, and that no other question but that of jurisdiction was presented to the lower court.

II.

That Section 128 of the Judicial Code of the United States, 36 Stat. L., 1133, as amended by 38 Stat. L. 803, gives no appellate jurisdiction to the United States Circuit Courts of Appeals in matters where the jurisdiction of the lower court alone is involved.

III.

That Section 9 of the Panama Canal Act, approved August 24, 1912, (37 Stat. L., 560569), providing for appeals from the District Court of the Canal Zone to the United States Circuit Court of Appeals of the Fifth Circuit, makes no provision for appeals in actions in which the jurisdiction of the District Court of the Canal Zone is involved and an appeal prosecuted on that question alone.

IV.

That Section 238 of the Judicial Code of the United States, 36 Stat. L., 1157, as amended by 38 Stat. L., 804, provides that appeals from the District Courts of the United States in cases in which the jurisdiction of the lower court is in issue shall be taken direct to the Supreme Court of the United States.

(Signed) A. HINDMAN,
Counsel for Defendants in Error and Appellees.

Service of the foregoing Motion to Dismiss and receipt of a copy thereof acknowledged this 8 day of March, 1922.

(Signed) WM. C. MACINTYRE,
Counsel for Appellant and Plaintiff in Error.

That thereafter, the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

Argument and Submission.

Extract from the Minutes of April 4th, 1922.

No. 3826.

HARVEY MCCONAUGHEY, for Himself and Others,

versus

J. J. MORROW, Governor of the Panama Canal, et al.

On this day this cause was called, and after argument by William H. Jackson, Esq., and William C. MacIntyre, Esq., for plaintiff in error and appellant, and A. C. Hindman, Esq., United States District Attorney, for defendants in error and appellees, was submitted to the Court.

Opinion of the Court.

Filed April 11th, 1922.

In the United States Circuit Court of Appeals, Fifth Circuit.

No. 3826.

HARVEY MCCONAUGHEY, for Himself and Others, Appellant and Plaintiff in Error,

versus

J. J. MORROW, Governor of the Panama Canal, et als., Appellees and Defendants in Error.

Appeal from and Error to the United States District Court for the Canal Zone.

William C. MacIntyre and William H. Jackson for Appellant and Plaintiff in Error.
A. C. Hindman for Appellees and Defendants in Error.

Before Walker, Bryan, and King, Circuit Judges.

WALKER, *Circuit Judge:*

The appellant and plaintiff in error, (who will be referred to as the plaintiff), brought this suit on December 24, 1921, against the appellees and defendants in error, who, respectively, are the Governor, Auditor, and Paymaster of the Panama Canal, and will be referred to as the defendants. The plaintiff's bill or petition alleged that he is an employee of the United States upon the Isthmus of Panama, in the service of the Panama Canal, is domiciled in the town of Balboa in the Canal Zone, and at the time of and prior to the bringing of the suit was occupying and using a dwelling with furniture and appurtenances, belonging to the United States, which was assigned to him for free use and enjoyment during the time of his stated employment. That pleading contains the following:

"And plaintiff brings this suit for himself and in behalf of all other citizens of the United States of America who are employees of the United States in the service of the Panama Canal and of the Panama Railroad, within the Canal Zone and upon the Isthmus of Panama. And the rights, interest, claims, grievances and demands of all other employees of the United States in the service of The Panama Canal and of the Panama Railroad, upon the Isthmus of Panama, as against the defendants herein, are identical with those of plaintiff, and the relief herein demanded affects all such parties equally with plaintiff, and all of such persons are interested parties in the final outcome of this suit; but the plaintiff says, and shows unto the Court, that all of such persons interested herein, as afore-

said, number about three thousand, (3,000), more or less, and reside at different parts of the Canal Zone, and of the Isthmus of Panama, and that it is impracticable to join all of such parties as parties plaintiff hereto."

The relief prayed was an injunction restraining the defendants from putting into effect an executive order made by the President on December 3, 1921, providing for a charge being made for rent, fuel, electric current, water, and services in connection with Government owned quarters, on and after January 1, 1922. On the day the bill was filed an order was made requiring the defendants, at a time and place named, to show cause why the preliminary injunction prayed for should not be granted. The defendants filed a paper which, after stating that the defendants appeared specially for the purposes of the motion only, contained a motion to quash the order to show cause and to dismiss the bill of complaint for the following reasons:

"1. That this Court is without jurisdiction of the subject matter of the said bill, in that it is a suit to enjoin the collection of funds for and on behalf of the United States and for deposit in the Treasury of the United States, and is, therefore, in effect a suit against the United States.

2. That this Court is without jurisdiction of the subject matter of the said bill and of the persons of these defendants, for the reason that it appears from said bill that said defendants are officials of the Executive Branch of the Government of the United States, and in the matters complained of in said bill are acting in their respective official capacities by and under the direction of the President of the United States. That this Court has no jurisdiction to enjoin the President of the United States, or any other person carrying out his orders in their official capacities.

3. That the Executive Branch of the United States Government and the Judicial Branch of the United States Government are co-ordinate branches, and there is no jurisdiction in this Court to enjoin a co-ordinate branch of the United States Government in the exercise of its executive discretion."

The Court sustained that motion, and dismissed the bill. The plaintiff sued out both an appeal and a writ of error.

In this court the defendants moved to dismiss the appeal and writ of error on the ground that no question other than that of jurisdiction was presented in the court below, and that this court is without power to review the decree dismissing the bill on the above set out grounds. We do not think that the motion in pursuance of which the bill was dismissed raised a question as to the jurisdiction of the trial court within the meaning of Federal statutes providing for appellate review in cases in which the jurisdiction of a court of the United States is in issue. The propriety of granting the relief sought was brought into question on principles which are applicable where the court has jurisdiction of the parties and the subject matter. The motion invoked the decision of the court on the as-

serted right of the plaintiff to have the relief sought. It did not raise a question as to the power or jurisdiction of the court to rule on that question. Fore River Shipbuilding Co. v. Hogg, 219 U. S. 175. Furthermore, the case is one within the appellate jurisdiction conferred on this court by a provision contained in Section 9 of the Panama Canal Act, 37 Stat. 565. By that provision this court is given "jurisdiction to review * * * final judgments and decrees of the District Court of the Canal Zone * * * in all actions and proceedings in which the Constitution, or any statute * * * of the United States is involved and a right thereunder denied," etc. The bill in this case asserted the claim that the plaintiff, as an employee of the United States in the Canal Zone, was entitled to free quarters under orders or regulations which were in force at the time of the enactment of the Panama Canal Act, and that those orders or regulations were within the terms of the following provision of Section 2 of that Act:

"That all laws, orders, regulations, and ordinances adopted and promulgated in the Canal Zone by order of the President for the Government and sanitation of the Canal Zone and the construction of the Panama Canal are hereby ratified and confirmed as valid and binding until Congress shall otherwise provide."

The claim asserted by the suit is that the just quoted provision of the statute had the effect of continuing in force until Congress shall otherwise provide, the above mentioned orders or regulations as to providing employees with quarters and that the President is without power to require the payment of rent by employees occupying Government owned quarters in the Canal Zone. The suit is one involving a statute of the United States, and the effect of the dismissal of the bill was a denial of a right asserted under that statute. The conclusion is that the case is one within the appellate jurisdiction conferred on this court by the above quoted provision. That provision alone, and not any provision or provisions of the Judicial Code, is to be looked to when the question is as to the right of this court to review a final judgment or decree of the District Court of the Canal Zone. That provision contains no exception having the effect of depriving this court of jurisdiction to review a final judgment in a case within any of the enumerated classes by reason of the jurisdiction of the District Court of the Canal Zone being brought into question in such case.

The acquisition of the Canal Zone by the United States was followed by the construction, with money appropriated by Congress, of dwelling houses for the use of employees of the United States engaged in the service of the Isthmian Canal Commission, the Panama Canal and the Panama Railroad. While the Isthmian Canal Commission was in existence it pursued the policy of allowing Government employees to use, free of rent, Government owned dwellings and quarters. This policy was evidenced by orders or regulations adopted and promulgated from time to time by the Isthmian Canal Commission. On February 13, 1907, it adopted the following regulation, to be effective April 1, 1907: "Whenever practicable and in the best

interest of the service, an employee will be provided with such quarters on the Isthmus as may be available from time to time." We understand that the just quoted regulation is the one on the subject which was in force at the date of the enactment of the Panama Canal Act on August 24, 1912. In behalf of the plaintiff it is contended that the above quoted provision of section 2 of that Act had the effect of keeping the just quoted regulation in force "until Congress shall otherwise provide." If that position is a tenable one it does not follow that the plaintiff has an enforceable right to continue to occupy, free of rent, the Government property which was assigned for his use. The language of that regulation negatives the conclusion that thereby the employer relinquished or abridged its right to determine, in the case of any employee, whether it is or is not practicable and in the best interests of the service to provide such employee with quarters on the Isthmus. The matter remained one as to which the employer had and retained a right to exercise its unregulated and unqualified judgment or discretion. The terms of the regulation make the continuance of the privilege or benefit in question dependent upon the authorized representative or representatives of the employer continuing to be of opinion that it is in the best interests of the service not to change the policy or practice. An employee has no legally enforceable right to what the employer has the option to grant or withhold as the latter's judgment or discretion may dictate. The continuance of the arrangement practically was no more assured than it would have been if a tenancy at the will of the employer had been created. The existence of the regulation and what was done under it brought about a situation like that resulting from a contract which is so uncertain and contingent in its terms as to be legally unenforceable. Brown v. Camp, 275 Fed. 612; Wald's Pollock on Contracts, (3rd Ed.), 48, 49.

The above quoted provision of section 2 of the Panama Canal Act does not purport to continue in force anything other than "laws, orders, regulations and ordinances adopted and promulgated * * * for the government and sanitation of the Canal Zone and the construction of the Panama Canal." The just quoted language does not indicate an intention to embrace the matter of the terms of employment and the housing of Government employees rendering services in the Canal Zone. The sole plaintiff in this case bases the right asserted by the suit on the fact that he is an employee of the United States upon the Isthmus of Panama in the service of the Panama Canal. It is not shown that the services the plaintiff was employed to render have any connection with the government and sanitation of the Canal Zone or the construction of the Panama Canal. No other person has made himself a party plaintiff. See Bruce v. Manchester & Keene Railroad, 117 U. S. 514.

Section 4 of the Panama Canal Act contains the following:

"When, in the judgment of the President, the construction of the Panama Canal shall be sufficiently advanced toward completion to render the further services of the Isthmian Canal Commission unnecessary, the President is authorized, by executive order, to discontinue the Isthmian Canal Commission, which, together with the

present organization, shall then cease to exist; and the President is authorized thereafter to complete, govern, and operate the Panama Canal and govern the Canal Zone, or cause them to be completed, governed, and operated, through a Governor of the Panama Canal and such other persons as he may deem competent to discharge the various duties connected with the completion, care, maintenance, sanitation, operation, government, and protection of the Canal and Canal Zone."

Section 7 of that Act defines the duties of the Governor, and requires him to perform the executive and administrative duties required by existing law. In 1914 the President, under the authority conferred by Section 7 of the Panama Canal Act, abolished the Isthmian Canal Commission, and assumed the duties and powers conferred on him in the situation so brought about. The above quoted language of section 4 evidences an intention to vest in the President power to determine such matters as terms and conditions of employment and the regulation of the use of Government property by Government employees in the Canal Zone, in respects not governed by existing law. We are not advised of any law having the effect of depriving the President of the power to require payment of rent for the use of Government owned residence property in the Canal Zone, or of conferring on an employee situated as the plaintiff is the right to continue to use such property free of rent. On January 15, 1915, the President made an executive order which contained the following:

"The free use of quarters, free fuel and free electric current are not, under the conditions of employment now governing, a vested or contract right of employes, but revocable privileges, which it has been considered advisable to continue until the permanent force was organized. The revocation of these privileges shall not be made the basis for increasing salaries or wages or otherwise increasing compensation."

The continuance thereafter of the practice of allowing employees to use Government owned dwellings or quarters free of rent was with full notice that the privilege was subject to revocation, and would be revoked at a time deemed appropriate. We do not think that the President did what he was without power to do in discontinuing the privilege or benefit in question in the manner adopted.

For reasons above indicated we conclude that the plaintiff is not entitled to have the defendants enjoined from putting into effect the above mentioned executive order made by the President on December 3, 1921, and that the court did not err in dismissing the bill. The decree to that effect is affirmed.

(Original Filed April 11th, 1922.)

Judgment.

Extract from the Minutes of April 11th, 1922.

No. 3826.

HARVEY MCCONAUGHEY, for Himself and Others,

versus

J. J. MORROW, Governor of the Panama Canal, et als.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Canal Zone, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause, be, and the same is hereby, affirmed.

Petition for Appeal and Order Allowing Same.

Filed April 15th, 1922.

United States Circuit Court of Appeals, Fifth Circuit.

No. 3826.

HARVEY MCCONAUGHEY, for Himself and Others, Appellant,

v.

J. J. MORROW, Governor of the Panama Canal, et als., Appellees.

Petition for Appeal.

To the Honorable the Judges of the United States Circuit Court of Appeals for the Fifth Circuit:

The Petition of Harvey McConaughey, Appellant herein, made for himself and in behalf of all of those in whose behalf he brought his suit, as is set forth in his original complaint in this cause filed, respectfully showeth unto Your Honors:

That on the thirty-first day of January, 1922, Appellant filed in this Court his Appeal and Writ of Error, duly accompanied by his Assignments of Error, wherein he appealed to this Honorable Court from a final judgment and decree made and entered by the Honorable Charles Kerr, United States District Judge for the Canal Zone, in the District Court for the Canal Zone, the Fifth day of January, 1922. And all proper proceedings therein having been had, thereafter, to wit, upon the 4th day of April, 1922, said Appeal was duly heard by this Honorable Court and submitted to this Honorable Court upon briefs and arguments of the respective parties hereto.

And thereafter, to wit, upon the 11th day of April, 1922, this Honorable Court made and entered its judgment, order and decree, affirming the judgment and decree of the Honorable the District Court for the Canal Zone, and denying unto Your Petitioner the relief sought by him in his said Appeal.

Your Petitioner believes that said judgment, order and decree of this Honorable Court were erroneous, and that injustice would be done if the same should be allowed to stand and be carried into effect.

Wherefore, by virtue of the right reserved unto him by the provisions of the Act of Congress of August 24, 1912, known as the Panama Canal Act, Your Petitioner respectfully prays for leave to appeal from said judgment, order and decree of this Honorable Court, unto the Supreme Court of the United States.

(Signed) WM. C. MACINTYRE,
Solicitor for Appellant.

Order.

Let the appeal herein prayed for be allowed upon the making and filing by the Appellant of a good and proper bond in the sum of $1,000. Given in chambers, at New Orleans, La., this 15th day of April, 1922.

(Signed) N. P. BRYAN,
U. S. Circuit Judge.

Assignments of Error.

Filed April 15th, 1922.

In the United States Circuit Court of Appeals, Fifth Circuit.

No. 3826.

HARVEY MCCONAUGHEY, for Himself and Others, Appellant and Plaintiff in Error,

versus

J. J. MORROW, Governor of the Panama Canal, et als., Appellees and Defendants in Error.

Assignments of Error.

Comes now the appellant in the above entitled cause and files the following assignments, upon which he will rely upon his prosecution of the appeal in the above entitled cause from the decree made by this Honorable Court on the 11th day of April, 1922.

I.

That the United States Circuit Court of Appeals for the Fifth Circuit erred in holding and ruling that the President of the United

States has the power and authority, under the act of Congress of August 24, 1912, known as the Panama Canal Act, to promulgate for the Canal Zone his Executive Order of December 3, 1921.

II.

That the United States Circuit Court of Appeals for the Fifth Circuit erred in holding that the Executive Order of January 15, 1915, constituted legal notice to appellant and to all other employees of the United States in the service of the Panama Canal and the Panama Railroad upon the Isthmus of Panama, or that said Executive Order was or is legal notice that the practice of giving to appellant and to said employees the use of government owned quarters upon the Canal Zone, free of rent, might be or would be discontinued at the pleasure of the President.

III.

That the United States Circuit Court of Appeals for the Fifth Circuit erred in failing to notice and to give legal effect to the Executive Order of July 25, 1916, which said Executive Order annuls, cancels and repeals the Executive Order of January 15, 1915, and abrogates all rules made thereunder, and which said Executive Order of July 25, 1916, legally made and promulgated by the President of the United States, by authority of the Panama Canal Act, guarantees the use of government owned quarters upon the Isthmus of Panama, free of rent to appellant and to all employees of the United States in the service of the Panama Canal upon the Canal Zone, during the term of their employment.

IV.

That the United States Circuit Court of Appeals for the Fifth Circuit erred in holding and ruling that the President of the United States has the power and authority to dispose of the property of the United States on the Canal Zone, by rent or otherwise, without the specific sanction of Congress.

V.

That the United States Circuit Court of Appeals for the Fifth Circuit erred in failing to hold and to find that the arbitrary collection of monies from appellant and those in whose behalf he sues in the manner as set forth in the original complaint filed herein constitutes an illegal texation of appellant and those in whose behalf he sues, contrary to the provisions of Paragraph 4, Section 9 of Article 1 of the Constitution, and of Paragraph 1, Section 7 of Article 1 of the Constitution, and Section 8 of Article 1 of the Constitution.

VI.

That the United States Circuit Court of Appeals for the Fifth Circuit erred in failing to hold and decree that injunction should lie

against the appellees herein to prevent the illegal withholding from appellant and those in whose behalf he sues of wages by them earned, the monies for which have been duly appropriated by Congress and are in the hands of appellees for the payment of such wages.

VII.

That the United States Circuit Court of Appeals for the Fifth Circuit erred in failing to notice and give effect to the opinions of attorneys-general defining the power of the President to legislate or make rules for the Canal Zone under the restrictions and limitations of the Panama Canal Act of August 24, 1912.

VIII.

That the United States Circuit Court of Appeals for the Fifth Circuit erred in failing to hold that Congress has the exclusive power to change laws and regulations of the Canal Zone, and to make rules for the disposition of the property of the United States upon the Canal Zone.

IX.

That the United States Circuit Court of Appeals for the Fifth Circuit erred in failing to hold that appellant and those in whose behalf he sues are occupying their quarters upon the Canal Zone under contract with the United States to hold such quarters free of rent during the period of their employment in the service of the Panama Canal and of the Panama Railroad on the Canal Zone.

X.

That the United States Circuit Court of Appeals for the Fifth Circuit erred in holding that the appellant and those in whose behalf he sues have no vested rights in the occupation of the government owned quarters upon the Canal Zone, under the terms of their employment.

XI.

That the United States Circuit Court of Appeals for the Fifth Circuit erred in holding, under authority of the case of Bruce vs. Manchester & King Railroad, 117 U. S., 514, that the appellant, Harvey McConaughey, is the sole plaintiff in this cause, and in failing to hold that all those in whose behalf he sues, as set forth in his complaint, are co-plaintiffs in this action.

XII.

That the United States Circuit Court of Appeals for the Fifth Circuit erred in holding that Section 53 of the Laws of the Canal Zone was not continued in force upon the Canal Zone by the Panama Canal Act of August 24, 1912, and in holding that the President, by Executive Order, has any power or authority to change the provisions of said Section 53 of the Laws of the Canal Zone.

XIII.

That the United States Circuit Court of Appeals for the Fifth Circuit erred in affirming any part of the decree in this cause made by the Honorable District Court for the Canal Zone.

XIV.

That the United States Circuit Court of Appeals for the Fifth Circuit erred in not reversing the decree of January 5, 1922, made by the District Court of the Canal Zone, in this cause.

Wherefore, the appellant prays that said decree be reversed and that said United States Circuit Court of Appeals for the Fifth Circuit be ordered to enter a decree reversing the decision of the lower court in said cause.

(Signed) WM. C. MACINTYRE.
WM. H. JACKSON (W. C. M.),
Solicitors for Appellant.

Appeal Bond.

Filed April 17th, 1922.

United States Circuit Court of Appeals, Fifth Circuit.

No. 3826.

HARVEY MCCONAUGHEY, etc., Appellant,

v.

J. J. MORROW, Governor of the Panama Canal, et als., Appellees.

Bond of Appeal.

Know all men by these presents:

That we, Harvey McConaughey, as principal and Union- Indemnity Co., as surety, are, and hereby recognize ourselves to be well and truly bound unto J. J. Morrow, Governor of the Panama Canal, H. A. A. Smith, Auditor of the Panama Canal, and R. W. Glaw, Paymaster of the Panama Canal, in the penal sum of One thousand dollars ($1,000.00), for the payment whereof we hereby bind ourselves, our heirs, Executors, Administrators, and Assigne-s, according to the terms, stipulations, and agreements of this obligation, which are as follows:

Whereas Harvey McConaughey, in the above styled and numbered cause now pending in the U. S. Circuit Court of Appeals for the Fifth Circuit, has prayed, and has been allowed an appeal unto the Supreme Court of the United States, from the judgment of said Cir-

cuit Court of Appeals made and entered on the 11th day of April 1922; now, if the said Harvey McConaughey shall well and truly prosecute said appeal unto said Supreme Court, and shall well and truly pay, or cause to be paid, all costs and damages herein which may be finally adjudged against him, then, and in such event, this obligation shall be wholly discharged and void: otherwise to remain in full force and effect for the faithful payment unto the said J. J. Morrow, Governor of the Panama Canal, H. A. A. Smith, Auditor of the Panama Canal and R. W. Glaw, Paymaster of the Panama Canal of all such costs and damages, not to exceed said penal sum stipulated of One thousand dollars ($1,000.00.)

In witness whereof we, the said principal, by William C. MacIntyre, his attorney and the surety, Union Indemnity by S. S. Levy, Agent & Atty.-in-fact, have hereunto affixed our hands and seals, in the City of New Orleans, State of Louisiana, the 17th day of April, A. D. 1922.

HARVEY McCONAUGHEY,
Principal,

(Signed) By WM. C. MacINTYRE,
Attorney.

UNION INDEMNITY COMPANY,
Surety,

(Signed) By S. S. LEVY, [SEAL.]
Agent & Attorney-in-Fact.

Bond approved this April 17, 1922.
(Signed) N. P. BRYAN,
U. S. Circuit Judge.

Clerk's Certificate.

UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Circuit.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 93 to 114 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 3826, wherein Harvey McConaughey, for Himself and Others, is appellant and plaintiff in error, and J. J. Morrow, Governor of the Panama Canal et als., are appellees and defendants in error, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 92 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 10th day of May, A. D. 1922.

[Seal of United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals, Fifth Circuit.

THE UNITED STATES OF AMERICA:

The President of the United States to J. J. Morrow, Governor of the Panama Canal; H. A. A. Smith, Auditor of the Panama Canal, and R. W. Glaw, Paymaster of the Panama Canal, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to an Appeal sued out and filed in the Clerk's Office of the United States Circuit Court of Appeals for the Fifth Circuit, in the cause wherein Harvey McConaughey, for himself and others, employees of the Panama Canal and of the Panama Railroad Company, upon the Canal Zone, is the Appellant, and J. J. Morrow, Governor of the Panama Canal, H. A. A. Smith, Auditor of the Panama Canal, and R. W. Glaw, Paymaster of *of* the Panama Canal, are the Appellees, to show cause, if any there be, why the Judgment rendered against the said Harvey McConaughey, etc., Appellant, and in said petition and order of appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable William Howard Taft, Chief Justice of the United States, this Seventeenth day of April, in the year of our Lord one thousand nine hundred and twenty-two.

[Seal of United States Circuit Court of Appeals, Fifth Circuit.]

N. P. BRYAN,
United States Circuit Judge.

[Endorsed:] Original. No. 3826. United States Circuit Court of Appeals, Fifth Circuit. Harvey McConaughey, for Hi*l*self and Others, Appellant, vs. J. J. Morrow, Governor of the Panama Canal, and Others, Appellees. Citation. Filed 10th day of May 1922. Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals.

Served the within Citation by personally delivering a true copy of same to each of the following named as follows: To Col. J. J. Morrow, Governor of the Panama Canal, at Balboa Heights, Canal Zone, April 29th, 1922; to H. A. A. Smith, Auditor of the Panama Canal,

at Balboa Heights, Canal Zone, April 28th, 1922; and to R. W. Glaw, Paymaster of The Panama Canal, at Cristobal, Canal Zone, April 29th, 1922.

HORACE D. RIDENOUR,
U. S. Marshal for the Canal Zone,
By FRANK T. HAMLIN,
Deputy.

Marshal's fees:

Service	$3.00
Mileage	5.00
	$8.00

Endorsed on cover: File No. 28,933. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 393. Harvey McConaughey, for himself and others, employees of the Panama Canal and of the Panama Railroad Company, appellant, vs. J. J. Morrow, Governor of the Panama Canal; H. A. A. Smith, auditor of the Panama Canal, and R. W. Glaw, paymaster of the Panama Canal. Filed May 17th, 1922. File No. 28,933.